



Cornell University
ILR School

Cornell University ILR School
DigitalCommons@ILR

Board Decisions - NYS PERB

New York State Public Employment Relations
Board (PERB)

4-10-2017

State of New York Public Employment Relations Board Decisions from April 10, 2017

Follow this and additional works at: <https://digitalcommons.ilr.cornell.edu/perbdecisions>

Thank you for downloading an article from DigitalCommons@ILR.

Support this valuable resource today!

This Article is brought to you for free and open access by the New York State Public Employment Relations Board (PERB) at DigitalCommons@ILR. It has been accepted for inclusion in Board Decisions - NYS PERB by an authorized administrator of DigitalCommons@ILR. For more information, please contact catherwood-dig@cornell.edu.

If you have a disability and are having trouble accessing information on this website or need materials in an alternate format, contact web-accessibility@cornell.edu for assistance.

State of New York Public Employment Relations Board Decisions from April 10, 2017

Keywords

NY, NYS, New York State, PERB, Public Employment Relations Board, board decisions, labor disputes, labor relations

Comments

This contract is part of a digital collection provided by the Martin P. Catherwood Library, ILR School, Cornell University. The information provided is for noncommercial educational use only.

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

TEAMSTERS LOCAL 118,

Petitioner,

-and-

CASE NO. C-6429

TOWN OF HARTSVILLE,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure, and it appearing that a negotiating representative has been selected;

Pursuant to the authority vested by the Public Employees' Fair Employment Act;

IT IS HEREBY CERTIFIED that the Teamsters Local 118 has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

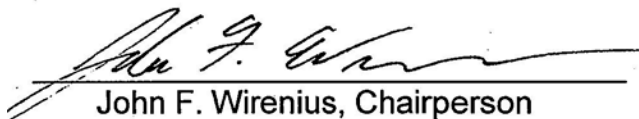
Included: All full-time and regular part-time Motor Equipment Operators.

Excluded: All others titles.

FURTHER, IT IS ORDERED that the above named public employer shall

negotiate collectively with the Teamsters Local 118. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: April 10, 2017
Albany, New York


John F. Wirenius, Chairperson
Allen C. DeMarco, Member
Robert S. Hite, Member

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

**CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,
LOCAL 1000, AFSCME, AFL-CIO,**

Petitioner,

-and-

CASE NO. C-6430

TOWN OF FENTON,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure, and it appearing that a negotiating representative has been selected;

Pursuant to the authority vested by the Public Employees' Fair Employment Act;

IT IS HEREBY CERTIFIED that Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

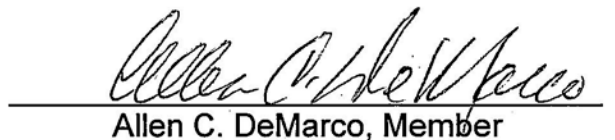
Included: All full-time and part-time Laborers and Mechanics.

Excluded: All other employees, including the Deputy Highway Superintendent and Dog Control Officer.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: April 10, 2017
Albany, New York


John F. Wirenius, Chairperson


Allen C. DeMarco, Member


Robert S. Hite, Member

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

**ITHACA POLICE BENEVOLENT ASSOCIATION,
INC.,**

Petitioner,

- and -

**CASE NOS. – IA2014-002/
M2013-105**

CITY OF ITHACA,

Respondent.

JOHN M. CROTTY, ESQ., for Petitioner

**ROEMER WALLENS GOLD & MINEAUX LLP (EARL T. REDDING, ESQ., of
counsel), for Respondent**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Ithaca Police Benevolent Association, Inc. (PBA) to a December 23, 2016 letter ruling by the Director of Conciliation (Director) denying the PBA's petition for interest arbitration with the City of Ithaca (City) for the period from January 1, 2012 through December 31, 2013, on the basis that the PBA was not eligible for interest arbitration for that time period.

EXCEPTIONS

The PBA excepts to the Director's ruling on four grounds. First, the PBA contends that the Director erred in refusing the PBA's request to file a memorandum of law responding to the City's demand that the Director decline to process the PBA's petition for interest arbitration. Second, the PBA claims that the Director exceeded his authority and erred in addressing the merits of the City's claims that the PBA did not have the right to proceed to interest arbitration for an award covering 2012-2013. As its third exception, the PBA asserts that the Director erred on the merits by denying the petition for interest arbitration. Finally, the PBA maintains that the Director erred by

refusing to designate an interest arbitration panel.

The City filed a response supporting the Director's letter ruling.

For the reasons that follow, we reverse the Director's ruling.

FACTS

Background

In March, 2012, the PBA and the City began negotiations for a successor to their collective bargaining agreement that expired on December 31, 2011. The PBA filed a declaration of impasse on or about July 10, 2013, and, after conciliation efforts failed to resolve the impasse, on or about May 12, 2014, the City filed a petition for interest arbitration pursuant to § 209.4 of the Public Employees' Fair Employment Act (Act) and § 205 of PERB's Rules of Procedure (Rules). The next day, the PBA acknowledged receipt of the petition, but refused to consent to submit to interest arbitration, choosing instead, to stand on its right to *status quo* under § 209-a.1 (e) of the Act.¹ Accordingly, the PBA requested the Director not process the City's petition for interest arbitration. The Director granted that request, and no public arbitration panel was designated.

Subsequently, the City attempted to commence a new round of negotiations for a successor agreement with a starting date of January 1, 2014. The PBA responded by requesting negotiations for a successor agreement covering 2012 and 2013, the same two-year period as the City's May 12, 2014 petition for interest arbitration in which the PBA declined to participate. Then, the City filed an improper practice charge, claiming that the PBA violated § 209-a.2 (b) of the Act by refusing to negotiate with the City for a successor agreement with a starting date of January 1, 2014. The City alleged that the

¹ Cf., *City of Kingston*, 18 PERB ¶ 3060 (1985).

PBA had no right to insist on negotiations for the same period that it previously stood on its rights under § 209-a.1 (e), arguing that the PBA's refusal to participate in the interest arbitration for which the City petitioned in May 2014, constituted a waiver of its right to rekindle negotiations for the same period. In addressing that dispute in *City of Ithaca (Ithaca I)*, we rejected the City's "waiver" argument, but found that the City's "duty to negotiate in good faith over the *status quo* period, here 2012 and 2013, ha[d] been satisfied."²

The instant dispute

On December 2, 2016, the PBA filed the instant petition for interest arbitration, seeking an award to cover the period January 1, 2012 through December 31, 2013 – the same period at issue in our previous decision. The City objected to the PBA's petition. The Director's December 23, 2016 letter ruling under review declined to process the petition, stating:

I have carefully reviewed and considered all submissions by the representatives of both parties as well as the Board decision in this matter. First and foremost, the Board has already ruled in this case and held that the City has fulfilled its bargaining obligation for the very period of time for which the PBA seeks interest arbitration. It is a fundamental principal that the same parties are precluded from re-litigating the same matter. Thus, to effectuate the decision of the Board, it is unnecessary to further analyze the parties' arguments regarding merits. The central ruling by the Board is that the City cannot be compelled to participate in interest arbitration for the period in question. The petition filed by the City in 2014 was denied in order to uphold the rights of the PBA. Now the City asserts the corollary defense. Accordingly, I find the union is not eligible to pursue interest arbitration for changes in terms for the period of January 1, 2012 through December 31, 2013. The petition for interest arbitration filed by the PBA on December 2, 2016 is hereby

² *City of Ithaca*, 49 PERB ¶ 3030, 3097 (2016).

denied.³

The City filed an improper practice charge, alleging that the PBA's demands for 2012 and 2013 are not arbitrable.⁴ That charge is currently pending before an ALJ.

DISCUSSION

In *City of Rensselaer*, we recently reaffirmed that:

There is no question that we have delegated discretion to the Director in order for him to make necessary determinations involving the dispute resolution provisions of the Act and Rules, subject to our review of those determinations. A determination concerning the processing of a petition for compulsory interest arbitration is one specific example of such delegated discretion. In particular, the Board has expressly reaffirmed its delegation, subject to review, to the Director of "determinations on jurisdictional questions such as whether an impasse in negotiations exists and substantive questions such as whether a petitioning party is entitled to interest arbitration," as well as "procedural disputes regarding the striking procedure."⁵

We concluded that "[i]t is well-settled that the necessary eligibility determination is within the exclusive province of the Director, subject to the Board's review."⁶

However, pursuant to § 205.6 of our Rules, "[o]bjections to the arbitrability of any matter set forth in the petition or response may only be raised by the filing of an improper practice charge or a declaratory ruling petition pursuant to the requirements of

³ Director of Conciliation Letter Ruling, December 23, 2016, at pp. 1-2.

⁴ Charge U-35450.

⁵ 49 PERB ¶ 3016, 3064 (2016) (footnotes omitted), *citing* Act, §§ 205.4 (a) and 205.5 (k); *Bd of Educ of the City Sch Dist of the City of New York*, 34 PERB ¶ 3016 (2001); *Patrolmen's Benevolent Assn of the City of New York, Inc.*, 40 PERB ¶ 3010 (2007).

⁶ *City of Rensselaer*, 49 PERB ¶ 3016, at 3066, *citing* *Patrolmen's Benevolent Assn of the City of New York, Inc.*, 40 PERB ¶ 3010, at 3033-3034; *see also*, *County of Monroe*, 39 PERB ¶ 3018 (2006); *Yates County*, 16 PERB ¶ 8001 (1983). As our quotation from *City of Rensselaer* makes clear, procedural and other ancillary or supplemental issues relating to the arbitration process or eligibility also fall within the jurisdiction of the Director.

this section.”⁷ Thus, under *City of Rensselaer* threshold questions of *eligibility* for interest arbitration and related procedural and substantive issues are delegated to the Director, while § 205.6 of the Rules directs that questions of substantive *arbitrability* are to be decided through an improper practice or a declaratory ruling proceeding. Section 205.6 of the Rules further provides that “[t]he public arbitration panel shall not make any award on issues, the arbitrability of which is the subject of an improper practice charge or a declaratory ruling petition, until final determination thereof by the board or withdrawal of such charge or petition; the panel may make an award on other issues.”⁸ Simply put, if the Director determines that the eligibility requirements are not met, no interest arbitration panel need be designated. Where, however, arbitrability is properly challenged, the Director shall designate the panel, but the panel cannot rule on the matters alleged to be improperly submitted to it until the arbitrability challenge is resolved.

The only issue before us is whether the City’s objection to the PBA’s petition for interest arbitration covering the two-year period at issue in *Ithaca I* raises a question of arbitrability, cognizable under § 205.6 of the Rules, or a question of eligibility or of procedure, which the Director is authorized to answer.

We have not had occasion to distinguish between eligibility for interest arbitration and arbitrability for purposes of § 205.6 (a) of the Rules. Thus, this case presents a question of first impression.

For the reasons that follow, we conclude that the question presented here is one of arbitrability, not of eligibility. Accordingly, we find that the Director did not have the

⁷ Rules, § 205.6 (a).

⁸ Rules, § 205.6 (d).

authority to dismiss the PBA's petition for interest arbitration.

We first examine § 205.6 of our Rules. To the extent that the policies of the Act are not inconsistent, norms of regulatory construction can usefully supplement our knowledge of policies and practices under the Act over the last 50 years. As in *City of Watertown*,⁹ also decided this day, we note that “[t]he tenets of statutory construction apply equally to administrative rules and regulations,” and can assist in filling in gaps in the Rules where the policies of the Act or the text of the Rules do not dictate a particular result.¹⁰ Accordingly, we begin with the plain meaning of the text.¹¹

Section 205.6 expressly addresses objections to “the arbitrability of any *matter* set forth in the petition or response.”¹² While the term “arbitrability” is not defined in the Rules, the specification that such challenges are properly addressed to any “matter” frames the scope of any challenge. The use of the term “matter” denotes that a challenge to arbitrability comprehends a claim that the “subject” or “substance” of the dispute for which arbitration is sought is not properly subject to arbitration.¹³

Likewise, the expressly non-exclusive list of objections to arbitrability in § 205.6 reinforces our conclusion that objections to arbitrability are directed at whether the

⁹ 50 PERB ¶ 3006 (2017).

¹⁰ *Springer v Bd of Educ of the City Sch Dist of the City of NY*, 27 NY3d 102, 107 (2016), citing *Matter of Cortland–Clinton, Inc v New York State Dept of Health*, 59 AD2d 228, 231 (4th Dept 1977).

¹¹ *Id* (“We construe the regulation in accordance with its plain language”).

¹² *Id* (emphasis added).

¹³ This definition of “matter” is employed in both non-technical and technical contexts. See WEBSTER'S NEW THIRD INTERNATIONAL DICTIONARY (1966) at 1394; James A. Ballentine, SELF-PRONOUNCING LAW DICTIONARY (2d Ed. 1948) at 523 (“A fact or facts constituting the whole or a part of a ground of action or defense”); William S. Anderson, BALLENTINE'S LAW DICTIONARY (3d Ed. 1969) at 783 (same; citing cases); Bryan A. Garner, BLACK'S LAW DICTIONARY (8th Ed. 2004) at 999 (“A subject under consideration. . . .an allegation forming the basis of a claim or a defense”).

subject matter of the dispute sought to be submitted to compulsory arbitration falls within the scope of interest arbitration. As § 205.6 (a) of the Rules further provides, “[o]bjections as to arbitrability may include, but not be limited to, the following circumstances:

- (1) a matter proposed is not a mandatory subject of negotiations;
- (2) a matter proposed was not the subject of negotiations prior to the petition;
- (3) a matter proposed had been resolved by agreement during the course of negotiations.¹⁴

Each of these objections is predicated on the subject matter of the proposed claim to be submitted to arbitration. While the list is not exclusive, under the rule of construction known as *ejusdem generis*, “a series of specific words describing things or concepts of a particular sort are used to explain the meaning of a general one in the same series.”¹⁵

Thus, the use in § 205.6 of the Rules of the word “matter” in defining the challenge and in the non-exclusive listing of several exemplary challenges suggest that other challenges to arbitrability would in the main likewise constitute proposed “matters.” In other words, a challenge to arbitrability is generally an objection on the basis that the

¹⁴ *Id.* While not dispositive, we note that the understanding of arbitrability in the labor law community and in analogous legal contexts in New York law is consistent with this characterization. See, eg, Katharine Seide, A DICTIONARY OF ARBITRATION (1970) at 22 (defining arbitrability as “[t]he concept that an issue in dispute between parties is subject to arbitration . . .”); Jerome Lefkowitz, et al, PUBLIC SECTOR LABOR AND EMPLOYMENT LAW (3d Ed. Rvd. 2015) at 1136, 1137-1143 (Arbitrability analysis in public sector cases requires courts “to examine the subject matter of the dispute in an effort to determine whether it is arbitrable under the [Act]”; discussing cases.

¹⁵ *Matter of Riefberg*, 58 NY2d 134, 141 (1983); *Lend Lease (U.S.) Const. LMB Inc. v Zurich American Ins. Co.*, 136 AD3d 52, 57 (1st Dept 2015); see generally, Statutes, § 239.

subject of the demand does not fall within the appropriate scope of interest arbitration.¹⁶ Eligibility, on the other hand, involves the question of whether the parties or those whom they represent have the right to invoke interest arbitration, regardless of the specifics of the individual dispute for which arbitration is sought.¹⁷ In sum, eligibility determinations, which have been delegated by the Board to the Director, are questions of *who* is entitled to or may properly petition for interest arbitration, while arbitrability questions concern *what* may be submitted to interest arbitration, and are to be determined under the Rules through the vehicle of an improper practice or declaratory ruling proceeding. Arbitrability goes to the character of the substance of the dispute, while eligibility goes to the character of the parties.

We next examine the issues raised by the PBA's interest arbitration petition. As explained below, we find that these issues do not fall within the Board's delegation to the Director to determine eligibility. There is no question that the employees represented by the PBA are within the ambit of § 209.4 of the Act and § 205.3 of the Rules, and thus eligible for compulsory interest arbitration. Rather, the objections stated by the City fundamentally concern the content of the PBA's specific demands, and whether the City's satisfaction of its duty to negotiate for the period in question renders these particular demands inappropriate for arbitration between these parties for the hiatus period. Had, for example, the demands submitted been made for the two-year period following the hiatus (i.e. 2014-2015) during which the PBA asserted its right to stand on the *status quo*, such a petition would have been processed and submitted to

¹⁶ *Id.*

¹⁷ See, eg, *City of Rensselaer*, 49 PERB ¶ 3016, at 3066, citing cases.

a panel. In this instance, the basis for the ruling was the Director's conclusion that the subjects of the demands were not ones properly submitted to an interest arbitration panel, and therefore one of arbitrability to be resolved through an improper practice proceeding.

Nor do the issues fall within the sort of procedural, ancillary, or supplemental issue that has been delegated to the Director by the Board. Because the issues presented in this matter are so intertwined with those decided in our recent decision between the same parties concerning the same time period, the matter could reasonably be mistaken to be such an issue, and we cannot fault the Director for finding such to be the case absent prior guidance from the Board. However, the text of § 205.6 of the Rules makes clear that disputes as to whether the subject matter of a particular demand renders that demand outside of the permissible scope of interest arbitration fall within that rule's ambit, regardless of whether the basis for the objection is expressly contemplated by § 205.6 of the Rules or not.

Although we find that the Director lacked the authority to dismiss the PBA's petition for interest arbitration, we express no opinion on the propriety of the PBA's petition itself, and we do not address the exceptions, the response to the exceptions, or the submissions of *amici* to the extent they address the merits of the arbitrability of the at issue demand. The question of the arbitrability of the PBA's demands is before the ALJ in the pending improper practice proceeding. In this regard, however, we note that § 205.6 (d) of the Rules provides that the public arbitration panel "shall not make any award on issues, the arbitrability of which is the subject of an improper practice charge . . . until final determination thereof by the board or withdrawal of such charge or

petition”

Finally, we note that, as in *City of Rensselaer*, the PBA through its counsel has chosen to speculate about the motives and probity of the Director, without any evidentiary or factual basis. Such argumentation is both inappropriate and unpersuasive.

Accordingly, the Director’s letter ruling is reversed, and the matter remanded to the Director for proceedings consistent with this opinion.

DATED: April 10, 2017
Albany, New York



John F. Wirenius, Chairperson

Allen C. DeMarco, Member

Robert S. Hite, Member

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

**UNIFORMED FIREFIGHTERS ASSOCIATION
OF SCARSDALE, INC., LOCAL 1394, IAFF,
AFL-CIO,**

Charging Party,

CASE NO. U-33467

- and -

VILLAGE OF SCARSDALE,

Respondent.

**MEYER, SUOZZI, ENGLISH & KLEIN, P.C. (RICHARD S. CORENTHAL of
counsel), for Charging Party**

**BOND SCHOENECK & KING, PLLC (TERRY M. O'NEIL and EMILY E.
HARPER of counsel), for Respondent**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Village of Scarsdale (Village) to a decision of an Administrative Law Judge (ALJ) finding that the Village violated § 209-a.1 (d) of the Public Employees' Fair Employment Act (Act) by unilaterally changing procedures for sick leave use and refusing to negotiate the impact of those changes.¹ The ALJ ordered the Village to rescind the new sick leave use procedures and engage in impact bargaining. The ALJ further ordered that any affected unit employees of the Uniformed Firefighters Association of Scarsdale, Inc., Local 1394, IAFF, AFL-CIO (Association) be made whole, and a notice be posted.

EXCEPTIONS

The Village excepts to the ALJ's decision on four grounds. First, it contends that the ALJ erred in finding that the Village had violated the Act by promulgating a new sick

¹ 48 PERB ¶ 4587 (2015).

leave management program (SLMP), claiming that the provisions regarding physician's notes, mandated quarterly reviews, and evaluation and disciplinary procedures, either did not affect terms and conditions of employment, were non-mandatory, or did not actually constitute changes.² Second, the Village asserts that the ALJ erred in finding that the Village refused to negotiate the impact, on the ground that the Association's demand to negotiate was not "clearly communicate[d]" and could not reasonably be interpreted as a demand for impact bargaining.³ Additionally, the Village excepts to the ALJ's finding credible the Association's witness' testimony regarding the demand to negotiate and the Village's response.⁴ Finally, the Village contends that the ALJ erred in ordering rescission of the SLMP, make whole relief, and impact bargaining.⁵

For the reasons stated below, we affirm the ALJ's findings that that the Village violated § 209-a.1 (d) of the Act when it unilaterally issued certain portions of the SLMP involving physician notes, quarterly counseling, and evaluation and disciplinary procedures. We reverse the ALJ's finding that the Village violated the Act when it refused to negotiate the impact of the SLMP.

FACTS

The ALJ's decision contains a detailed discussion of the facts and the entire SLMP. The facts and portions of the SLMP are reiterated herein only as necessary to address the Village's exceptions.

On April 3, 2014, the Village's Fire Chief Thomas Cain, the Director of Human Resources, Angela Martin, the Association's President, Brian Robinson, and the Association's Vice President, Jim Seymour, were present for a meeting to discuss the

² Exceptions, at ¶ 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11.

³ Exceptions, at ¶ 12, 14.

⁴ Exceptions, at ¶ 12, 13.

⁵ Exceptions, at ¶ 16, 17, 18, 19.

Village's SLMP.⁶ Robinson testified that Cain prefaced the discussion by saying that the Village was glad to meet with the Association for informational purposes, but that the meeting was not a negotiation.⁷ Robinson recalled telling Cain that he believed the Association had the right to negotiate the new SLMP and that it would have "extensive ramifications" on his members.⁸ He further testified that he identified some of those ramifications during that meeting, such as increased costs for co-pays and emergency room visits, and impacts on overtime and off-duty employment.⁹ Cain testified that he did not remember Robinson asking to negotiate the impact of that policy, or any questions about increased co-pays and deductibles.¹⁰ The meeting ended with Robinson informing Cain that he would look over the SLMP and file an improper practice charge, if necessary.¹¹

On April 7, 2014, the Village unilaterally introduced and began implementing the new SLMP.¹² At the same time, the Village issued a revised sick leave policy.¹³

Prior to the issuance of the SLMP, unit members were required to provide physician notes for any absence because of sickness or injury in excess of three workdays.¹⁴ Since April 7, 2014, pursuant to the SLMP, the Village requires physician notes for:

- a. consecutive sick days;
- b. sick days taken immediately before or after a Kelly day, vacation day, personal day, compensatory/time owed day, or mutual day;

⁶ Tr, at p. 51.

⁷ Tr, at p. 52.

⁸ Tr, at p. 53.

⁹ Tr, at p. 53, 55.

¹⁰ Tr, at pp. 154-156.

¹¹ Tr, at p. 56.

¹² Joint Ex. 2A.

¹³ Joint Ex. 5.

¹⁴ Joint Ex. 7.

- c. for any sick day for the remainder of the calendar year after two sick days have already been taken with a six (6) month period;
- d. and for all employees designated as [an excessive sick leave user (ESLU)].¹⁵

The SLMP further dictates that “when a physician is unavailable, the employee shall go to a hospital’s emergency room and secure such a note”¹⁶

Additionally, the SLMP imposes a new requirement regarding “quarterly reviews”:

- 1) Supervisors will schedule quarterly counseling sessions for any employee who has used more than two sick days in a six (6) month period.
- 2) Captains shall refer Firefighters to the Fire Chief when their sick time usage continues with the same frequency in successive quarters.
- 3) Captains will be counseled by the Fire Chief when their own sick time usage continues with the same frequency in successive quarters.¹⁷

Cain testified that, prior to the SLMP’s requirement for quarterly reviews, he advised supervisors that they were expected to counsel firefighters “whose use of sick leave is excessive.”¹⁸ Indeed, Captains annually obtained a form to complete regarding their employees’ sick leave use, which indicated that they were to counsel employees whose sick leave use was “higher than the Village average.”¹⁹ This form contained questions that would assist the employer in determining whether the employee’s use should be considered excessive, i.e., asking whether there were extenuating circumstances causing the employee’s use of sick leave for that year.²⁰ Cain testified that during these counseling sessions with employees, captains were supposed to obtain the information

¹⁵ Joint Ex. 2A.

¹⁶ Joint Ex. 2A, § 1A03.B. See *also* Tr, at pp. 165-166 (Martin clarified that employees could also obtain the physician note from an urgent care facility rather than an emergency room).

¹⁷ Joint Ex. 2A, § 1A03.C.

¹⁸ See Respondent’s Ex. 5. See *also* Tr, at p. 160.

¹⁹ Respondent’s Ex. 6.

²⁰ *Id.*

requested on the form and then, if the employees did not have extenuating circumstances explaining their sick leave use, the captain was supposed to counsel them.²¹

Employees “who have used more sick hours in the previous calendar year than the average for the Village of Scarsdale Police Department members with the exception of the Police Chief and clerical staff during that same year shall tentatively be designated as ESLUs [excessive sick leave users].”²² An employee “who is tentatively identified as an ESLU shall meet with the Fire Chief to discuss their designation. The employee will have an opportunity to present mitigating circumstances, including the nature of their absences and their prior attendance record.”²³

The SLMP provides that, after the meeting:

3) The Fire Chief shall notify the employee no later than seven (7) calendar days after their meeting of his final ESLU designation. If the Fire Chief designates the employee an ESLU, the employee shall:

* * *

c. Attend an annual counseling session with the Fire chief at the conclusion of the calendar year to determine the employee's ESLU status for the upcoming year and to determine possible discipline at the discretion of the Fire Chief, up to and including termination.

4) ESLU final designation may affect a member's eligibility for voluntary overtime and off duty employment.²⁴

DISCUSSION

As a threshold matter, the Village points to two policy declarations which it argues put employees on notice of the Village's right to unilaterally change the at-issue sick leave procedures.²⁵ The first, General Order 1-1-1 states in pertinent part that

²¹ Tr, at pp. 160-164.

²² Joint Ex. 2A, § 1A03.E.

²³ *Id.*

²⁴ *Id.*

²⁵ Village's Brief in Support of Exceptions, at p. 13.

“[t]he necessity for periodic review and revision of policies and operations procedures is recognized as a highly important component of this system.”²⁶ . . . The second provision, General Order 1-1-3 states that “the establishment of policies shall be a management prerogative.”²⁷

In *State of New York (Department of Corrections)*, the Board rejected a similar argument to that made here, claiming that a broad provision in a policy manual rendered changes to sick leave documentation requirements nonmandatory.²⁸ In that decision, the Board relied on *New York City Transit Authority*, in which the Board had explained that “a reservation of right in an employer's policy does not stem from the employer satisfying its duty to negotiate under the Act. Therefore, the Board must strictly construe a policy-based reservation of right in order to effectuate the policies of the Act.”²⁹ Here, as in *State of New York*, the lack of language “which establishes a plain and clear intent to exempt the [Village] from the strong public policy favoring the negotiation of all terms and conditions of employment” requires rejection of the Village's argument.³⁰ Rather, as we explained in *County of Cortland*, “[s]uch a broad reading of the [General Orders] would not, as we see it, effectuate the policies of the Act, but would, rather, allow for the extrapolation of corollary rights from an explicit reservation of right that is broader than permissible under the Act.”³¹

Proceeding to the merits, it is well established that “[t]he procedures for granting

²⁶ Village's Ex. 1, § 1.06 (D).

²⁷ Village's Ex. 2, § 3.02 (D).

²⁸ 31 PERB ¶ 3065, 3144 (1998).

²⁹ 42 PERB ¶ 3012, 3039 (2009), *confirmed sub nom. New York City Transit Auth (NYCTA) v New York State Pub Empl Relations Bd*, 78 AD3d 1184 (2d Dept 2010), *affd*, 19 NY3d 876 (2012); *see also County of Cortland*, 48 PERB ¶ 3028, 3110 (2015) (quoting *NYCTA*).

³⁰ 31 PERB ¶ 3065, at 3144.

³¹ 48 PERB ¶ 3028, at 3110; *see also Village of Catskill*, 43 PERB ¶ 3001 (2010).

and terminating sick leave and returning to work are mandatorily negotiable.”³² In particular, changed requirements for submission of medical documentation or physician’s notes are mandatory.³³ The Village’s reliance for the contrary proposition on *Poughkeepsie City School District*³⁴ misreads that decision. In *Poughkeepsie CSD*, the Board found nonmandatory a policy which stated that employees who used sick leave in excess of 10 days without medical documentation would be “presumed” to have abused their leave rights and would be in jeopardy of being disciplined. In so doing, the Board found that:

This announcement has not altered any of the terms or conditions of employment of unit employees. The number of sick leave days available to them has neither been increased nor diminished. All that has happened is that the employees have been put on notice as to the standards that the District will be using in monitoring sick leave and as to circumstances which may persuade it to initiate disciplinary proceedings.³⁵

The Board carefully noted that, despite the District’s use of the word “presumption,” in any disciplinary proceeding resulting from the policy, “the burden of proving sick leave abuse would still fall upon the District.”³⁶

The SLMP at issue here does not merely announce the Village’s standards for detecting sick leave abuse, but rather mandates that employees submit medical documentation under different and additional circumstances than they had been

³² *City of New Rochelle*, 47 PERB ¶ 3004, 3011 (2014), citing *Plainedge UFSD*, 7 PERB ¶ 3050 (1974); and *City of Schenectady*, 24 PERB ¶ 3016 (1991); see also *Triborough Bridge and Tunnel Auth.*, 27 PERB ¶ 3076 (1994); *State of New York (DOCS)*, 31 PERB ¶ 3065 (1998); *City of New York*, 35 PERB ¶ 3034 (2002).

³³ *State of New York (DOCS)*, 37 PERB ¶ 3023, 3064 (2004); *State of New York (DOCS)*, 31 PERB ¶ 3065, at 3144; see also *City of New York v Bd of Collective Bargaining*, 107 AD3d 612, 612-613 (1st Dept 2013) (upholding administrative finding that employer’s unilateral requirement of a doctor’s “fit for duty” statement following an employee’s absence from service for three or more days violated the City’s duty to negotiate).

³⁴ 19 PERB ¶ 3046 (1986); see also *City of New York*, 40 PERB ¶ 3017 (2007).

³⁵ *Id.*, at 3099.

³⁶ *Id.*

required to in the past. Accordingly, it is mandatorily negotiable, and its unilateral implementation violated the Act.³⁷ Moreover, the imposition of extra cost to the employees in obtaining such documentation itself is mandatory.³⁸

We affirm in part the ALJ's finding that the quarterly reviews for those employees using "more than two sick days within a six (6) month period" as provided for in the SLMP are a mandatory subject of bargaining. We begin by noting that the Village "has the inherent managerial right to establish the standards to determine sick leave abuse and to monitor an employee's use of sick leave under those standards."³⁹ Moreover, the Village's communication of those standards, and of the circumstances which may persuade it to enforce them, is likewise non-mandatory.⁴⁰ To the extent the quarterly reviews fulfill these functions, they are non-mandatory. However, the record here establishes that, at the counseling sessions the captains seek to obtain from the employees evidence, oral or documentary, of whether employees could establish "extenuating circumstances" explaining their excessive use of sick leave and, if not, the counseling sessions would result in a corrective plan of action or, ultimately, measures, including but not limited to, loss of overtime opportunities and off duty

³⁷ See *State of New York (DOCS)*, 37 PERB ¶ 3023, at 3064; *State of New York (DOCS)*, 31 PERB ¶ 3065, at 3144; *City of New York v Bd of Collective Bargaining*, 107 AD3d 612, at 612-613.

³⁸ See *County of Cortland*, 48 PERB ¶ 3028, at 3110-3111; *City of Schenectady*, 26 PERB ¶ 3025, 3042 (1993); *City of Syracuse*, 44 PERB ¶ 3017, 3066 (2011).

³⁹ *City of New York*, 40 PERB ¶ 3017, 3069 (2007); *Poughkeepsie City Sch Dist*, 19 PERB ¶ 3046, at 3099.

⁴⁰ *Poughkeepsie City Sch Dist*, 19 PERB ¶ 3046, at 3099; *City of New York*, 40 PERB ¶ 3017, at 3069.

employment approval.⁴¹ Under these circumstances, we find that the increased participation by providing information, either oral or documentary, at the quarterly counseling sessions required by the SLMP represent increased participation in the monitoring of employees' use of sick leave, a mandatory subject.⁴² The potential consequences stemming from the provision of information, or the failure to do so at these meetings, reinforces our finding of negotiability.⁴³

We are not persuaded by the City's argument that the ALJ erred in finding a violation of the Act by the imposition of additional counseling duties on the captains, simply because we find that the ALJ did not base her finding of a violation on such a finding.⁴⁴ Therefore, we do not have before us a claim that the assignment of additional work to the captains violated the Act.

The last portion of the SLMP at issue involves the repercussions of a tentative ESLU designation. The Village asserts that because the disciplinary ramifications of the ESLU designation are "discretionary," it does not change unit members' terms and conditions of employment.⁴⁵ In support of this position, the Village cites to the Board's

⁴¹ Tr, at pp. 161-162; Joint Ex. 2A, § 1A02.

⁴² *Patchogue-Medford Union Free Sch Dist*, 30 PERB ¶ 3041 (1997); *County of Cortland*, 48 PERB ¶ 3028, 3111-3112 (2014). See also *Bd of Educ of the City Sch Dist of the City of New York v New York State Pub Empl Relations Bd*, 75 NY2d 660, 669 (1990), 23 PERB ¶ 7012, 7013 (1990); *City of Yonkers*, 40 PERB ¶ 3001 (2007), citing *Suffolk County BOCES, Second Supervisory Dist*, 17 PERB ¶ 3043 (1984). See also *Newburgh Enlarged City Sch Dist*, 20 PERB ¶ 3053 (1987). *Port Jefferson Union Free Sch Dist*, 33 PERB ¶ 3047 (2000); *Town of Ramapo*, 32 PERB ¶ 3072, 3169 (1999) ("imposition of a record keeping function on unit employees where none previously existed violates § 209-a.1 (d) of the Act").

⁴³ *County of Suffolk*, 40 PERB ¶ 3022 (2007) (citing *County of Nassau*, 31 PERB ¶ 3074 (1998); *State of New York (OMH)*, 31 PERB ¶ 3051 (1998)).

⁴⁴ The ALJ specifically held that "In terms of the captains referring firefighters to the Fire Chief, It is within the range of managerial prerogative for an employer to assign to supervisory personnel. However, there is also an improper unilateral change as to the captains who are counseled at the same frequency of the firefighters by the Fire Chief." 48 PERB ¶ 4587, at 4814.

⁴⁵ Brief in Support of Exceptions, at pp. 25-29.

discussion in *County of Suffolk*⁴⁶

As the Village does not dispute that the consequences of an ESLU designation are disciplinary in nature, we need only address the Village's reliance on the Board's emphasis on the automatic and mandatory nature of the disciplinary consequences in *County of Suffolk*, which we find to be inapposite here. *County of Suffolk* involved the question of whether certain demands were appropriately submitted for interest arbitration under § 209.4 (h) of the Act; the Board held the demand was disciplinary in nature and was, therefore, not appropriately submitted. While the automatic nature of the discipline bolstered the Board's holding in that matter, we have never held that a disciplinary procedure is nonmandatory simply because the imposition of discipline is discretionary.⁴⁷ Additionally, the SLMP specifically defines the potential penalties that may be imposed, including loss of eligibility for overtime, for off-duty employment, and termination; a potential penalty for misconduct is unquestionably a mandatory subject of bargaining.⁴⁸ Therefore, we affirm the ALJ's determination that the consequences attached to ESLU status under the SLMP are mandatorily negotiable.

Finally, it is well settled that the duty to bargain impact arises only upon a valid demand.⁴⁹ Such a demand must be clearly made; it cannot be inferred from a demand

⁴⁶ *County of Suffolk*, 40 PERB ¶ 3022, at 3089 (emphasis added).

⁴⁷ See *NYCTA*, 20 PERB ¶ 3037 (1987), *affd* 147 AD2d 574, 22 PERB ¶ 7001 (2d Dept 1989), *enfd* 156 AD2d 689, 23 PERB ¶ 7002 (2d Dept 1990). See also *City of Buffalo*, 23 PERB ¶ 3050 (1990).

⁴⁸ *Solvay Teachers Assn*, 28 PERB ¶ 3024, 3057 (1995) ("The clause defines and limits both the grounds for the imposition of discipline and the penalties which may be invoked upon satisfaction of the predicate for disciplinary action. These are clearly mandatorily negotiable subjects" (citing *City of Glens Falls*, 24 PERB ¶ 3015 (1991); *City of Buffalo*, 23 PERB ¶ 3050 (1990); *NYCTA*, 20 PERB ¶ 3037 (1987); *City of Newburgh*, 16 PERB ¶ 3030 (1983)).

⁴⁹ *Niagara Frontier Transit Metro System, Inc.*, 36 PERB ¶ 3036 (2003), citing *Niagara Frontier Transportation Auth*, 18 PERB ¶ 4607 (1985), *remanded on other grounds*, 18 PERB ¶ 3083 (1985); *City of Rochester*, 17 PERB ¶ 3082 (1984); *Suffolk County BOCES, Second Supervisory District*, 16 PERB ¶ 3097 (1983).

to negotiate a decision, as impact and decisional bargaining rights and obligations are different.⁵⁰ A charging party must demonstrate that the demand was clearly made so that a reasonable person would understand from the face of the demand that it was seeking to bargain impact. On the record before us, no such demand for impact bargaining has been established. Even crediting Robinson's testimony in its entirety,⁵¹ the only demand that was made was for negotiations on the SLMP, as a whole. His testimony that he told Cain there would be extensive ramifications for his members and listing examples of those ramifications is not sufficient to put an employer on notice of a demand for impact bargaining.

IT IS, THEREFORE, ORDERED that the ALJ's findings are affirmed in part, reversed in part and the ALJ's order is MODIFIED AS FOLLOWS:

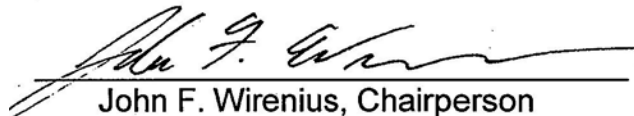
- 1) Cease and desist from implementing the above changes to General Order 1A03 (B) relating to the requirement of physician's notes; 1A03 (C) relating to quarterly reviews; and 1A03 (E) (3) (c) relating to annual counseling sessions;
- 2) Rescind the new sick leave procedures found violative above;
- 3) Make whole all unit employees for wages and benefits lost, if any, as a result of the implementation of the provisions of the General Order enumerated above, with interest at the maximum legal rate; and

⁵⁰ *Lackawanna City Sch Dist*, 28 PERB ¶ 3023 (1995), citing *County of Nassau (Nassau County Police Dept)*, 27 PERB ¶ 3054 (1994). See also *City of Rochester*, 17 PERB ¶ 3082.

⁵¹ The Board has long held that "[c]redibility determinations by an ALJ are generally entitled to 'great weight unless there is objective evidence in the record compelling a conclusion that the credibility finding is manifestly incorrect.'" *Village of Endicott*, 47 PERB ¶ 3017, 3051 (2014) (quoting *Manhasset Union Free Sch Dist*, 41 PERB ¶ 3005, at 3019, citing *County of Tioga*, 44 PERB ¶ 3016, at 3062; *Mount Morris Cent Sch Dist*, 41 PERB ¶ 3020 (2008); *City of Rochester*, 23 PERB ¶ 3049 (1990); *Hempstead Housing Auth*, 12 PERB ¶ 3054 (1979); *Captain's Endowment Assn*, 10 PERB ¶ 3034 (1977)). In the instant case, no such objective evidence demonstrating that the ALJ's credibility determinations are manifestly incorrect has been adduced, and we therefore will not reverse them.

4) Sign and post the attached notice at all physical and electronic locations normally used to communicate written information to unit employees.

DATED: April 10, 2017
Albany, New York



John F. Wirenius, Chairperson



Allen C. DeMarco, Member



Robert S. Hite, Member

**NOTICE TO ALL
EMPLOYEES**

**PURSUANT TO
THE DECISION AND ORDER OF THE**

**NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD**

and in order to effectuate the policies of the

**NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT**

we hereby notify all employees of the Village of Scarsdale in the bargaining unit represented by the Uniformed Firefighters Association of Scarsdale, Inc., Local 1394, IAFF, AFL-CIO that the Village will:

- 1. Not implement the provisions of the General Order 1A03 (B) relating to the requirement of physician's notes; 1A03 (C) relating to quarterly reviews; and 1A03 (E) (3) (c) relating to annual counseling sessions,
- 2. Rescind the new sick leave procedures found violative above; and
- 3. Make whole, all unit employees for wages and benefits lost, if any, as a result of the implementation of the provisions of the General Order enumerated, with interest at the maximum legal rate.

Dated

By
(Representative) (Title)

Village of Scarsdale

.

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

BRIAN BURKE,

Charging Party,

CASE NO. U-35278

- and -

NEW YORK CITY TRANSIT AUTHORITY,

Respondent.

BRIAN BURKE, *pro se*

DANIEL CHIU, for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Brian Burke to a letter ruling by an Administrative Law Judge (ALJ) dated February 7, 2017, denying Burke's application for a *subpoena duces tecum* or, in the alternative, a *subpoena ad testifandum* to be issued to the New York City Transit Authority (NYCTA), pursuant to § 211.3 of our Rules of Procedure (Rules). The ALJ denied the request, stating that "PERB does not allow discovery and does not permit subpoena requests to be used [for] that purpose."¹

EXCEPTIONS

Burke excepts to the ALJ's letter ruling on two grounds. First, Burke notes that the subpoena request was timely served in conformity with § 211.2 of the Rules and asserts that there is no suggestion in the ALJ's ruling that the subpoena did not conform with the procedural requirements of the Rules, nor that the request was "overbroad, or unnecessary or burdensome."² In excepting to the ALJ's finding that PERB does not allow discovery or the use of subpoenas for discovery, Burke contends that such a rule

¹ Attachment 2 to Exceptions.

² Exceptions, at ¶ 1.

“blocks PERB from properly performing its statutory [function],” asking how any meaningful process can take place where the trier of fact cannot review relevant information “in the sole possession of an adverse party.”³

NYCTA supports the ALJ’s ruling, arguing that Burke has not met the requisite showing of extraordinary circumstances for permission to file an interlocutory appeal, that attorney-client privilege shields the testimony of the specified NYCTA attorney and most, if not all, of any documents in NYCTA’s possession responsive to the request, and that, in any event, the subpoena is too broad and fails to identify the requested documents with sufficient specificity.

For the following reasons, we decline to grant permission for the filing of interlocutory exceptions.

DISCUSSION

Section 212.4 (h) of the Rules states, in relevant part, that:

All motions and rulings made at the hearing shall be part of the record of the proceeding, and unless expressly authorized by the board, shall not be appealed directly to the board, but shall be considered by the board whenever the case is submitted to it for decision.

More broadly, the Board has required a litigant to move for leave to file exceptions to non-final rulings and decisions.⁴ Although Burke has labeled his pleading as exceptions, we treat it as a motion for leave to file exceptions because it seeks

³ Exceptions, at ¶ 2.

⁴ See, eg, *Hyde Leadership Charter School*, 47 PERB ¶ 3022 (2014), citing *Mt Morris Cent Sch Dist*, 26 PERB ¶ 3085 (1993); *Greenburgh No 11 Union Free Sch Dist*, 28 PERB ¶ 3034 (1995); *Town of Shawangunk*, 29 PERB ¶ 3050 (1996); *New York State Housing Finance Agency*, 30 PERB ¶ 3022 (1997); *Council 82, AFSCME*, 32 PERB ¶ 3040 (1999); *Watertown City Sch Dist*, 32 PERB ¶ 3022 (1999); *UFT (Grassel)*, 32 PERB ¶ 3071 (1999); *City of Newburgh*, 33 PERB ¶ 3031 (2000); *State of New York (Division of Parole)*, 40 PERB ¶ 3007 (2007).

interlocutory review of an interim determination by the ALJ.⁵

As we have recently reaffirmed, “[t]he Board has consistently held that leave to file interlocutory exceptions to non-final rulings and decisions, pursuant to § 212.4 of the Rules, will only be granted in situations where the moving party demonstrates extraordinary circumstances.”⁶ As we explained in *CSEA (Arredondo)*:

It is more efficient for us and the parties to await a final disposition of the merits of a charge before examining interim determinations. The grant of interlocutory exceptions results in delays in the final resolution of the factual and legal issues raised by an improper practice charge or representation petition. Therefore, we have rejected most requests for permission to file exceptions, especially motions seeking review of interim rulings in improper practice cases.⁷

In *CSEA (Davitt)*, the Board explained that “[p]ursuant to § 211.1 of the Rules, an ALJ has the discretion to grant or deny a request for the issuance of subpoenas. The mere denial of such a request, without any additional relevant allegations, does not constitute extraordinary circumstances warranting the grant of leave to file exceptions.”⁸ Burke attempts to establish extraordinary circumstances by arguing that this matter raises important statewide legal implications, contending, that the ALJ’s letter ruling will be precedential and could lead to a wholesale abandonment on the part of ALJs to exercising their authority to issue subpoenas under § 211.2 of the Rules. However, no basis for this contention is provided, and we find none. In light of the discretionary authority granted to ALJs in regard to the issuance of an agency subpoena, the Board has held that it:

⁵ See *UFT (Grassel)*, 43 PERB ¶ 3033, 3127, n. 1 (2010).

⁶ *CSEA (Harper)*, 49 PERB ¶ 3013 (2016) (internal quotation marks omitted), citing *Bd of Ed, City Sch Dist City of NY (Grassel)*, 41 PERB ¶ 3016, 3080 (2008); see also *State of NY (Division of Parole)*, 40 PERB ¶ 3007 (2007); *UFT (Grassel)*, 32 PERB ¶ 3071 (1999); *Hyde Leadership Charter School*, 47 PERB ¶ 3022.

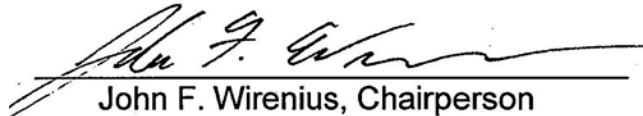
⁷ 43 PERB ¶ 3021, 3080-3081 (2010); see also *CSEA (Harper)*, 49 PERB ¶ 3013, at 3055.

⁸ 43 PERB ¶ 3015, 3057 (2011).

will not disturb a decision denying an application for a subpoena unless, upon our review of the entire record, we conclude that the ALJ abused his or her discretion resulting in prejudice to the requesting party's ability to present relevant and necessary evidence in support of a claim or defense.⁹

We cannot at this stage of the proceedings determine whether Burke has in fact been so prejudiced, or whether the ALJ's denial of a subpoena might be ameliorated or revisited during a hearing. As a result, we cannot undertake the appropriate review at this time. Accordingly, we deny the request to file exceptions without prejudice to Burke's bringing the issues raised therein before the Board in an appeal from a final order of the ALJ.

DATED: April 10, 2017
Albany, New York


John F. Wirenius, Chairperson


Allen C. DeMarco, Member


Robert S. Hite, Member

⁹ *Bd of Education of the City Sch Dist of the City of New York (Ruiz)*, 43 PERB ¶ 3022 (2011), citing *Oswego City Sch Dist (Carp)*, 25 PERB ¶ 3052 (1992).

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

**BUFFALO PROFESSIONAL FIREFIGHTERS
ASSOCIATION, INC., LOCAL 282, IAFF, AFL-CIO, CLC,**

Charging Party, **CASE NO. U-33421**

- and -

CITY OF BUFFALO,

Respondent.

**CREIGHTON, JOHNSEN & GIROUX (JONATHAN G. JOHNSEN of counsel),
for Charging Party**

**TIMOTHY A. BALL, CORPORATION COUNSEL (OMAR R. PRICE and
MELISSA SANCHEZ FERNANDEZ of counsel), for Respondent**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the City of Buffalo (City) to a decision of an Administrative Law Judge (ALJ) on an improper practice charge filed by the Buffalo Professional Firefighters Association, Inc., Local 282, IAFF, AFL-CIO, CLC (Local 282).¹ In her decision, the ALJ held that the City violated § 209-a.1 (d) of the Public Employees' Fair Employment Act (Act) when the City refused Local 282's request for information related to two pending grievances regarding alleged improper criminal record searches about Local 282 unit members.

EXCEPTIONS

In its exceptions, the City argues that the ALJ should have found that all of Local 282's requests were unreasonable, overbroad, unnecessary, and unduly burdensome.

¹ 49 PERB ¶ 4511 (2016).

The City also argues that the requested documents are exempt from disclosure on the grounds of privilege and confidentiality and because of an ongoing criminal investigation.

Local 282 supports the ALJ's decision.

Based upon our review of the record and our consideration of the parties' arguments, we affirm the decision of the ALJ but modify the remedial order.

FACTS

The facts are fully set forth in the ALJ's decision and are discussed here only as far as is necessary to address the exceptions. On February 5, 2014, unit employee William T. Buyers filed a grievance alleging that Deputy Fire Commissioner Joseph Tomizzi had run an unauthorized criminal record search on him.² On the same date, Local 282 filed a class grievance alleging that the City was running unauthorized criminal record checks on unit members.³

On February 18, 2014, Jonathan Johnsen, counsel for Local 282, made a written request for information to the City's Director of Labor Relations, Omar Price, referencing "Local 282 Grievance - Criminal Record Checks", and requesting the following:

1. All documents relating to any criminal record search conducted for any member of the Local 282 Bargaining Unit.
2. All documents related to any criminal record search conducted for William T. Buyers.
3. All documents relating to any criminal record search conducted by Deputy Commissioner Tomizzi for any member of the Local 282 Bargaining Unit.

² Tomizzi had access to the Erie County Central Police Services criminal records database for purposes of arson investigation.

³ The grievances alleged violations of the parties' collective bargaining agreement, including Articles II - Pledge Against Discrimination and Coercion, XXV – General Provisions, and XXVII - Maintenance of Benefits.

4. All documents relating to any investigation conducted by the City into the improper use of criminal record search on members of the Local 282 Bargaining Unit.
5. All documents relating to any policy of the City of Buffalo with regard to criminal record searches by City employees.
6. All documents relating to any correspondence, including e-mails, with regard to any attempted access or access by any City employee to search for the criminal records of any member of the Local 282 Bargaining Unit.⁴

Price responded to Johnsen on March 18, 2014, as follows:

The Office of the Corporation Counsel of the City of Buffalo is in receipt of your letter dated February 18, 2014 in which you request certain records pertaining to the above referenced matter. Your request is denied for the following reasons:

First, the office of the Corporation Counsel at the request of the Commissioner of Fire is currently conducting an internal investigation into the matter; as such the requested documents are subject to the attorney-client privilege and therefore protected from disclosure.

Secondly, to the extent that such records qualify as personnel records within the meaning of [NYS] Civil Rights Law § 50-a, such records are confidential and absent consent or a court order exempt from disclosure and not subject to inspection or review by your office.

If you have any other matters you wish to discuss please do not hesitate to contact my office.⁵

On February 18, 2014, Johnsen also filed an information request under the New York State Freedom of Information Law (FOIL) with Erie County Central Police Services for "all documents related to any criminal record search conducted to obtain the criminal records of any member of the Local 282 bargaining unit,"⁶ with a list of current members attached. The Erie County Department of Law, on March 14, 2014, denied the FOIL request on the basis that "these records are the subject of an ongoing criminal

⁴ Joint Exhibit 2.

⁵ Joint Exhibit 3.

⁶ Charging Party Exhibit 2.

investigation and disclosing them would interfere with that investigation.”⁷

Daniel Cunningham, President of the unit since 2009, testified that after Buyers filed his grievance, Local 282 asked the Commissioner and Deputy Commissioner if the City had run criminal checks on other unit employees and, after not receiving any answers, filed the class grievance. Following the March 18, 2014 denial of the request for information from Price, Local 282 made further verbal requests for the information, to no avail. Cunningham further testified that the City acknowledged in conversations that it had a list of the names which had been run, but refused Local 282’s request to provide it.

DISCUSSION

The ALJ found that the City violated § 209-a.1 (d) of the Act by refusing to turn over the documents requested in paragraphs 2, 3, and 5 of Local 282’s February 18, 2014 request. The ALJ found that the City did not violate the Act by refusing to turn over the documents requested in paragraphs 1, 4, and 6.⁸

It is well-settled under the Act that an employee organization has a general right to receive documents and information, requested from an employer, for use by the employee organization in collective negotiations, the resolution of negotiation impasses and in the administration of agreements including, but not limited to, the investigation of a potential grievance, the processing of a grievance and in the preparation for a

⁷ Charging Party Exhibit 3.

⁸ As neither the City nor the Union filed any exceptions to these portions of the ALJ’s decisions, any claims arising therefrom have been waived. *County of Clinton*, 47 PERB ¶ 3026, 3080, n. 3 (2014), citing Rules, § 213.2 (b) (4); *City of Schenectady*, 46 PERB ¶ 3025, at 3056, n. 8 (2013), *confirmed sub nom. Matter of City of Schenectady v New York State Pub Empl Relations Bd*, Index No. 4090/2011 (Sup Ct Albany Co July 9, 2014); *Town of Orangetown*, 40 PERB ¶ 3008 (2007), *confirmed sub nom. Matter of Town of Orangetown v New York State Pub Empl Relations Bd*, 40 PERB ¶ 7008 (Sup Ct Albany Co 2007); *Town of Walkill*, 42 PERB ¶ 3006 (2009).

grievance hearing and/or arbitration.⁹ The right to receive requested documents and information is limited by the necessity and relevancy of the information sought, the reasonableness of the request, considering the burden on the employer, and the availability of the information elsewhere.¹⁰ In certain limited circumstances, an employer may, under the Act, refuse to comply with an information request when it can demonstrate a legitimate claim that such production is prohibited by a specific statute, regulation, or the common law and that such prohibition does not fall afoul of the policies of the Act.¹¹ It is, however, the employer's burden to demonstrate that information or documents are exempt from disclosure.¹² Moreover, because a bargaining agent is entitled to relevant information necessary to enable it to exercise its rights and carry out its responsibilities under the Act, a bargaining agent is not similarly situated to the general public when it demands employment information from an employer about employees it is obligated to represent.¹³

In the current case, two grievances have been filed alleging that the City has run unauthorized criminal record searches on Local 282 unit members in violation of the

⁹ *Board of Ed, City Sch Dist of the City of Albany*, 6 PERB ¶ 3012, 3030 (1973) (*City of Albany*); *Hornell Cent Sch Dist*, 9 PERB ¶ 3032, 3061 (1976); *City of Rochester*, 29 PERB ¶ 3070, 3164-3165 (1996); *Schuyler-Chemung-Tioga BOCES*, 34 PERB ¶ 3019, 3042-3043 (2001); *County of Erie and Erie County Sheriff*, 36 PERB ¶ 3021, 3064 (2003), *confirmed sub nom. County of Erie and Erie County Sheriff v State of New York*, 14 AD3d 14, 37 PERB ¶ 7008 (3d Dept 2004); *Town of Evans*, 37 PERB ¶ 3016, 3049 (2004); *State of New York (OMRDD)*, 38 PERB ¶ 3036, 3125 (2005), *confirmed sub nom. CSEA v New York State Pub Empl Relations Bd*, 14 Misc3d 199, 39 PERB ¶ 7009 (2006), *affd*, 46 AD3d 1037, 40 PERB ¶ 7009 (3d Dept 2007).

¹⁰ *Id.*; see also *Utica City Sch Dist*, 48 PERB ¶ 3008, 3026 (2015).

¹¹ *Hampton Bays Union Free Sch Dist*, 41 PERB ¶ 3008, 3052 (2008).

¹² *Town of Evans*, 37 PERB ¶ 3016, at 3050; *State of New York (OMRDD)*, 38 PERB ¶ 3036, at 3126; *State of New York - Unified Court System*, 41 PERB ¶ 3009, 3060 (2008), *vacated on other grounds, Pfau v PERB*, 24 Misc3d 260, 42 PERB ¶ 7003 (Sup Ct Albany County 2009), *affd*, 69 AD3d 1080, 43 PERB ¶ 7001 (3d Dept 2010).

¹³ *County of Yates*, 27 PERB ¶ 3080, 3184 (1994).

CBA. It is clear that certain documents are relevant and necessary for Local 282 to investigate, evaluate, and process the grievances, such as any documents showing that such searches have been run on unit employees, by whom the searches were requested and/or on whose behalf, the names of the employees searched, the date of such searches, and any documents relating to the reason such searches were conducted. We find that the ALJ properly dismissed the City's broad objection that the document request was, in all respects, unreasonable and unnecessary.

However, we find limited merit to the City's argument that the requests approved by the ALJ are overbroad. Specifically, we can discern no need on the part of Local 282 for the substantive results of the criminal record searches. The actual results of the searches are not, on the record before us, necessary or relevant in the context of the grievances at issue, which allege that the searches themselves were the discriminatory act. We emphasize that Local 282 does not seek to provide representation to any employees in association with the criminal investigations themselves, nor does it have any such rights under the Act.¹⁴ As a result, we shall modify the ALJ's order to permit the City to redact the substantive results of any criminal record searches.

We find no merit to the City's remaining arguments about why it should not be required to provide the requested information.

Although the City asserts that the requests are unduly burdensome, it has not proffered any evidence supporting its assertion. For example, the City has not specified what steps would be necessary to produce the information, nor has it provided an estimate of the time and resources necessary to take those steps. This lack of

¹⁴ See *City of Rochester v Pub Empl Relations Bd*, 15 AD3d 922, 38 PERB ¶ 7003 (4th Dept 2005), *annulling City of Rochester*, 37 PERB ¶ 3015 (2004), *lv denied*, 4 NY3d 710, 38 PERB ¶ 7008 (2005).

evidence is especially noteworthy in the current circumstances, where the ALJ found that Local 282 has been verbally advised that the City already has at its disposal a list of unit employees whose names were searched in the criminal database.¹⁵ In short, the City has in no way demonstrated that the request to provide the information would impose any burden on it, much less an undue burden, and we reject the City's bare assertion.¹⁶

Similarly, we find no support for the City's assertion that the requested documents are exempt from disclosure on the grounds of privilege and confidentiality under New York Civil Rights Law § 50-a, as asserted in the City's response to the Local 282's request.¹⁷ When a party objects to an information request on confidentiality and privilege grounds, that party has the burden to explain fully and clearly the facts and circumstances upon which the claimed exemption is based.¹⁸ The City has failed to do so here. For example, the City asserts that all of the requested documents are subject to attorney-client privilege as the result of an internal investigation. However, the City has not identified the specific material it believes to be exempt from the duty to produce, has made no showing that the requested documents were prepared in advance of litigation,¹⁹ that any of the requested documents consist of the work product of an attorney,²⁰ or that any of the requested documents consist of confidential communications shielded by the attorney-client privilege.²¹ The City has simply not met

¹⁵ 49 PERB ¶ 4511, at 4538.

¹⁶ *Utica City Sch Dist*, 48 PERB ¶ 3008, at 3026.

¹⁷ Joint Exhibit 3.

¹⁸ *Town of Evans*, 37 PERB ¶ 3016, at 3050; *State of New York (OMRDD)*, 38 PERB ¶ 3036, at 3126; *State of New York - Unified Court System*, 41 PERB ¶ 3009, at 3060.

¹⁹ New York Civil Practice Law and Rules (CPLR) § 3101 (d) 2.

²⁰ CPLR § 3101 (c).

²¹ CPRL § 4503 (a).

its burden of showing that any of the requested documents are subject to attorney-client privilege.

Likewise, the City has provided no support for its assertion that the requested documents are shielded from disclosure by New York Civil Rights Law (NYCRL) § 50-a. NYCRL § 50-a applies to police officers, firefighters, and correction officers and states that “[a]ll personnel records used to evaluate performance toward continued employment or promotion . . . shall be considered confidential and not subject to inspection or review without the express written consent of such . . . firefighter . . . except as may be mandated by lawful court order.” Even assuming that NYCRL § 50-a applies to documents requested by an employee’s certified bargaining representative, an issue that we need not and do not decide,²² it is evident that the City has not conducted a search to determine if the requested documents consist of personnel records used to evaluate performance. Rather, the City simply makes a broad assertion that it need not provide such documents “to the extent” that they are personnel records, without providing any grounds upon which they would constitute personnel records. Such a bare assertion, absent any specific explanation of the surrounding facts and circumstances, is not sufficient to meet the City’s burden of showing that the requested documents are exempt from the City’s duty to provide relevant requested documents to Local 282.

²² In finding that New York State’s Freedom of Information Law does not operate to bar access to requested information, the Board explained that “[a] bargaining agent is simply not similarly situated to the general public when it demands employment information from an employer about employees it is obligated to represent. . . . It is entitled to demand and receive relevant information from an employer under the Act because the information is needed to enable it to exercise its rights and carry out the responsibilities imposed upon it under the Act.” *Utica City Sch Dist*, 48 PERB ¶ 3008, 3026-3027 (2015), quoting *County of Yates*, 27 PERB ¶ 3080, at 3184.

We also reject the City's argument that the requested documents are exempt from disclosure based on confidentiality in light of ongoing criminal investigations. First, while there is evidence that the County of Erie refused to respond to Local 282's document request in March of 2014 on the basis of an ongoing criminal investigation,²³ there is no evidence that the *City* is itself either conducting a criminal investigation or is in any way involved in the County's investigation. The record also does not show the parameters of the criminal investigation or demonstrate why disclosure would harm the investigation. In some circumstances, a criminal investigation might be sufficient to exempt an employer from providing requested documents. Again, however, it was the City's burden to show that requested documents are exempt from disclosure, and the City has failed to do so here. The City's reliance on an investigation being carried out by an unrelated entity, asserted long after Local 282 requested documents, is insufficient to excuse the City from its Taylor Law obligation to provide relevant, requested information.

Moreover, prior to refusing to disclose information under the Act based on a claim of confidentiality, a respondent is obligated to first engage in good faith negotiations for the purpose of reaching an agreed-upon accommodation concerning the requested information.²⁴ There is no evidence that the City engaged in such negotiations with Local 282 aimed at reaching a voluntary accommodation of the City's asserted concerns.

The City also argues that the requested documents are exempt based on State

²³ Charging Party Exhibit 3.

²⁴ *Hampton Bays Union Free Sch Dist*, 41 PERB ¶ 3008, at 3052; *Erie County Medical Center Corp*, 45 PERB ¶ 3036, 3085 (2012).

law. First, the City argues that New York's Freedom of Information Law (FOIL)²⁵ allows governmental agencies, including municipal departments, to deny access to records that "are compiled for law enforcement purposes and which, if disclosed, would interfere with law enforcement investigations or judicial proceedings."²⁶ We reject this argument for the reasons given in *County of Yates*.²⁷ As the Board there explained, state FOIL does not excuse an employer's refusal to provide information where the requested information is relevant and the employer retains discretion to disclose such information under FOIL.²⁸ Moreover, even assuming that FOIL could act to bar a union's access to requested information, we would reject the City's argument in this context, where the City has made no showing that the requested documents were "compiled for law enforcement purposes" or that disclosure would "interfere with law enforcement investigations or judicial proceedings."

Finally, the City argues for an exemption based on requirements associated with access to records maintained by the New York State Division of Criminal Justice Services.²⁹ In this regard, the City argues that disclosure of information contained in criminal records is prohibited.³⁰ We need not address this argument specifically, as we have already found that Local 282 has not provided any basis for the production of the substantive results of any responsive search. Therefore, as narrowed above, our order does not require the City to turn over any information contained in unit employees' criminal records.

²⁵ Public Officers Law Art. 6, §§ 84-90.

²⁶ Public Officers Law § 87 (2) (e) (i).

²⁷ 27 PERB ¶ 3080, at 3184.

²⁸ *Id.*, at 3184. See also *Utica City Sch Dist*, 48 PERB ¶ 3008, at 3026.

²⁹ 9 NYCRR § 6150 et seq.

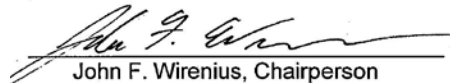
³⁰ 9 NYCRR § 6150.4.

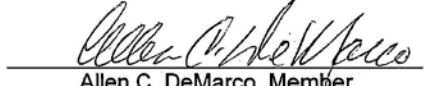
Based on the foregoing, we find that the City violated § 209-a.1 (d) of the Act when it refused to provide Local 282 with the documents requested in paragraphs 2, 3, and 5 of the Local 282's February 18, 2014 correspondence, except that the City may redact the substantive results of any criminal record search.


IT IS, THEREFORE, ORDERED that the City shall:

1. Provide to Local 282 copies of the documents which are responsive to its February 14, 2014 information demand, limited to:
 - a. All documents related to any criminal record search conducted for William T. Buyers, with the substantive results of any such search redacted;
 - b. All documents relating to any criminal record search conducted by Deputy Commissioner Tomizzi for any member of the Local 282 bargaining unit, with the substantive results of any such searches redacted; and
 - c. All documents relating to any policy of the City of Buffalo with regard to criminal record searches by City employees; and
2. Sign and post the attached notice at all physical and electronic locations normally used to communicate with unit employees.

DATED: April 10, 2017
Albany, New York


John F. Wirenius, Chairperson


Allen C. DeMarco, Member


Robert S. Hite, Member

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the City of Buffalo represented by the Buffalo Professional Firefighters Association, Inc., Local 282, that the City of Buffalo will:

Provide to Local 282 copies of the documents which are responsive to its February 14, 2014 information demand, limited to:

1. All documents related to any criminal record search conducted for William T. Buyers, with the substantive results of any such search redacted;
2. All documents relating to any criminal record search conducted by Deputy Commissioner Tomizzi for any member of the Local 282 bargaining unit, with the substantive results of any such searches redacted; and
3. All documents relating to any policy of the City of Buffalo with regard to criminal record searches by City employees.

Dated

By
on behalf of the City of Buffalo

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

**NEW YORK STATE PUBLIC EMPLOYEES FEDERATION,
AFL-CIO,**

Charging Party,

CASE NO. U-33773

- and -

**STATE OF NEW YORK (OFFICE OF TEMPORARY AND
DISABILITY ASSISTANCE),**

Respondent.

**BARRY MARKMAN, LABOR RELATIONS SPECIALIST, for Charging
Party**

**MICHAEL N. VOLFORTE, GENERAL COUNSEL (CLAY J. LODOVICE
of counsel), for Respondent**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the State of New York (Office of Temporary and Disability Assistance) (State or OTDA) to a decision of an Administrative Law Judge (ALJ), finding that that the State violated §§ 209-a.1 (a) and (d) of the Public Employees' Fair Employment Act (Act).¹ The ALJ found that OTDA violated the Act by refusing to provide requested documents to the New York State Public Employees' Federation (PEF) to assist it in investigating and processing a grievance to arbitration under a negotiated grievance and arbitration procedure.

EXCEPTIONS

The State submitted five exceptions to the ALJ's decision, which effectively state three bases. First, the State contends that the ALJ's deciding the case on the basis of the parties' submitted offers of proof violated its due process rights. In particular, the

¹ 49 PERB ¶ 4503 (2016).

State contends that “[a]lthough not stated within the [ALJ’s] [d]ecision, it appears that the ALJ’s finding was made pursuant to an assumption that all allegations made by the Charging Party are deemed true and given all inferences in favor of the Charging Party.”² In support of this exception, the State contends that the ALJ did not allow it to present evidence in support of its defenses and affirmative defenses. Indeed, the State asserts that “the ALJ did not grant the right set forth in the Rules for the Respondent to ‘call and examine witnesses, and to introduce into the record documentary or other evidence.’”³

The State’s second exception asserts that the ALJ failed to properly apply the established standard to determine whether the employer is required to produce information, in part, because the document requested was created after the grievance was filed, but also on the ground that the ALJ failed to properly balance the respective interests of the parties, especially the State’s interest in preserving the confidentiality of its investigation.

Finally, the State argues that, as a result of these errors, the ALJ had no basis to find that the requested documents were relevant to the grievance and unavailable elsewhere, whether through the prior improper practice between the parties or in the redacted version previously produced by the State pursuant to the Personal Privacy Protection Law. With respect to the latter, the State contends in its brief that “Respondent has already complied with the order to provide a copy of the [requested] report with the personal information of other individuals redacted;” accordingly, “OTDA has fully complied with the ALJ’s ordered remedy.”⁴

PEF did not respond to the exceptions.

² Exceptions, at ¶ 2.

³ *Id.*

⁴ Brief in Support of Exceptions at 23-24, citing Response to PEF’s Offer of Proof, Ex A.

For the reasons stated herein, we vacate the ALJ's decision and remand for further proceedings.⁵

FACTS

Usher Piller, a State employee working at OTDA, is a long-serving PEF representative. On July 19, 2013, Piller was instructed "to not arrive at the office prior to his official start time and to leave the building promptly at the end of the work day."⁶ According to the State, this instruction was intended to prevent Piller from "conducting non-work related activities, including entering the workspaces of other employees for non-work purposes, after regular working hours had concluded."⁷

On August 9, 2013, Piller filed a contractual grievance charging that the July 19, 2013 restrictions violated the collective bargaining agreement. Piller's grievance was denied at steps 1 and 2, and, on January 16, 2014, was appealed to step 3. No step 3 determination had been issued by OTDA by the time of the filing of the instant charge. The parties' collective bargaining agreement gives PEF the option of proceeding to binding arbitration, due to the lapse of time without a decision.

On August 15, 2013, Piller filed a complaint with the OTDA Bureau of Equal Opportunity and Diversity (EOD), alleging that the July 19, 2013 instruction constituted retaliation for Piller's opposition to discriminatory practices against another employee and that the access restrictions also constituted discrimination, unequal treatment, intimidation, and harassment.

Sylvia Hamer, OTDA's Chief of Diversity and Affirmative Action Officer, informed Piller on October 13, 2013, that she had been assigned to investigate his EOD complaint and she proceeded to interview him that day. Her report on the investigation

⁵ Because the ALJ who decided this case has left the agency, we remand this case to the Director of Public Employment Practices and Representation for reassignment.

⁶ Brief in Support of Exceptions, at 2-3, n. 1.

⁷ *Id.*

was completed on November 27, 2013. Piller has sought a copy of the report written by Hamer in multiple fora, including in the context of a separate improper practice charge.⁸ A heavily redacted copy of the report was provided to Piller by OTDA pursuant to the Personal Privacy Protection Law (PPPL) on May 12, 2014.⁹

On June 5, 2015, the ALJ sent a letter to the parties, memorializing the June 1, 2015 conference in this matter, and ordering PEF to “submit a written Offer of Proof as to the allegations against [OTDA] within thirty (30) days of this letter,” and giving OTDA “twenty-one (21) business days to respond.”¹⁰ The ALJ further informed the parties that “I will then make my determination in writing, or if further information is needed reconvene a hearing in the future.”¹¹

PEF asserted in its Offer of Proof that the report “more than likely contains crucial and relevant findings relevant to the grievance.”¹² The State filed its response, asserting, among other grounds for withholding the report, that the State’s interest in confidentiality outweighed PEF’s speculative assertion that the report contained relevant, let alone reasonably necessary, information.

DISCUSSION

We begin with the State’s suggestion that its provision of a copy of Hamer’s report means that “OTDA has fully complied with the ALJ’s ordered remedy.” Were this to be the case, we would then most likely dismiss the appeal as moot, as we have “long held that where the issues raised by improper practice charges are academic, we do not consider that the policies of the Act would be served by our consideration of the

⁸ This charge, U-32952, is presently pending before another ALJ.

⁹ State Response to PEF Offer of Proof, Ex. A; see also PEF Offer of Proof, Ex. F.

¹⁰ ALJ Letter to Parties, June 5, 2015.

¹¹ *Id* (emphasis added).

¹² PEF Offer of Proof, at p 2.

charges.”¹³

However, the ALJ's ordered remedy was “to provide PEF with a copy of Hamer's report with personal information of other individuals redacted.”¹⁴ OTDA's letter transmitting the redacted Hamer report to Piller explicitly states that it is “providing those parts of the [report] that contain personal information pertaining to you,” defining “personal information” as “any information concerning a data subject which, because of name, number, symbol, mark or other identifier, can be used to identify that data subject.”¹⁵ On its face, this production does not comport with the ALJ's order; where she ordered the production of the Hamer report with only personal information of individuals other than Piller redacted, OTDA provided the exact converse, that is, only those portions of the report which contain Piller's own personal information. The balance of the report, which constitutes the great majority of the document, is completely redacted.¹⁶ As a result, we cannot find that the production pursuant to the PPPL constitutes compliance with the ALJ's decision, and we move on to the merits of the State's exceptions.

The State raises several issues concerning the ALJ's proceeding by means of requiring an offer of proof, claiming that its due process rights were violated by the denial of a right to a hearing, the shifting of the burden of proof, and denial of an opportunity for the State to submit its defenses and affirmative defenses to the ALJ. These objections are not persuasive.

It is within an ALJ's authority to require parties to submit offers of proof and to

¹³ *County of Nassau*, 49 PERB ¶ 3014, 3056 (2016), quoting *East Meadow Union Free School Dist*, 48 PERB ¶ 3006, 3018-3019 (2015); see also *City of Peekskill*, 26 PERB ¶ 3062, 3109 (1993).

¹⁴ 49 PERB ¶ 4503, at 4504.

¹⁵ State Response to Offer of Proof, Ex A, cover letter at 1, quoting Public Officers Law §§ 92(7), 95(1)(a).

¹⁶ Offer of Proof, Ex F.

determine whether there are disputed issues of material fact requiring a hearing to resolve. As the Board explained in *Village of Belmont*, § 212.4 (a) of our Rules of Procedure (Rules) provides “that ‘a formal hearing shall be conducted as *necessary* by the administrative law judge.’”¹⁷ In determining whether a hearing is necessary, “an ALJ has the discretion while processing an improper practice charge, either at a pre-hearing conference, after the conference, during the hearing or at any other appropriate juncture, to require a party to submit an offer of proof in support of the allegations being processed.”¹⁸ Where the offer of proof and any response to it does not divulge the existence of a disputed issue of material fact requiring a hearing to resolve the dispute, the ALJ does not err in deciding the case on the pleadings, exhibits, and offer of proof.¹⁹

As the Board explained in *CSEA (Davitt)*,

Nor is it a denial of due process to dismiss a charge without completing the hearing when a party is unable to set forth sufficient facts in an offer of proof that would demonstrate a violation under the Act. The primary purpose of requiring an offer of proof is to provide a party with an opportunity to clarify the relevant facts in dispute, if any.²⁰

Likewise, requiring the parties to submit offers of proof as to not only claims and defenses as to which they bear the burden of proof, but their responses to such claims

¹⁷ 34 PERB ¶ 3008, 3014 (2001) (emphasis added) (editing marks omitted).

¹⁸ *Id.*, citing *Cent New York Regional Transp Auth*, 32 PERB ¶ 3053, 3125 (1999); *State of New York (DCS)*, 29 PERB ¶ 3015 (1996); *Nanuet Union Free Sch Dist*, 17 PERB ¶ 3005 (1984).

¹⁹ *CSEA (Davitt)*, 45 PERB ¶ 3028, at 3065; *see also Village of Belmont*, 34 PERB ¶ 3008, 3014, citing *County of Chautauqua*, 21 PERB ¶ 3057, 3123 (1988). *See also Village of Spring Valley*, 14 PERB ¶ 3010, 3016 (1981); *Wyandich Union Free Sch Dist*, 15 PERB ¶ 3069 (1982) (where offer of proof did not make out facts which if proven would establish elements of claim, the ALJ “did not err in not holding a hearing”); *New York City Bd of Ed*, 16 PERB ¶ 3048, 3073 (1983) (“No hearing was required as the case presents no question of fact”).

Even in these circumstances, parties may, of course, request the opportunity to file briefs, pursuant to § 212.5 of the Rules, to present arguments to the ALJ regarding conclusions to be drawn from the facts as well as issues of law.

²⁰ *CSEA (Davitt)*, 45 PERB ¶ 3028, 3065 (2012), citing *Niagara Frontier Transit Metro System, Inc.*, 42 PERB ¶ 3023, 3090 (2009); *see also Village of Spring Valley*, 14 PERB ¶ 3010, at 3016; *Nanuet Union Free School Dist*, 17 PERB ¶ 3005, at 3011.

and defenses, does not, absent more, impermissibly shift the burden of proof. As we explained in *Niagara Frontier Transit Metro System*, “[r]equiring an offer of proof does not alter the applicable burden of proof. Such a requirement provides the party with an opportunity to identify the facts it intends to prove at a hearing.”²¹

Only in the event that the ALJ does not credit both offers for the purpose of determining the existence of a disputed issue of material fact, but purports to resolve a material conflict between them, does the potential of reversing the burden of proof arise. Nor does the resultant disclosure of the substance of the evidence to be submitted should a hearing eventuate shift the burden of proof, or otherwise impair due process. As we recently reaffirmed, “[a]n ALJ has considerable discretion with respect to conducting hearings under § 212.4 of the Rules, including discretion to control the order of proof to promote an orderly and expeditious hearing,” and, where warranted by the circumstances, an ALJ would “not abuse that discretion by requiring one particular party to go first.”²²

To put it another way, the order of presentation is not necessarily coterminous with the burden of proof. For example, where a pleaded affirmative defense is both potentially dispositive and susceptible to expeditious and simple proof, an ALJ might properly exercise her discretion to proceed on that issue first, reserving the right to turn the hearing to the charging party’s case in the event the affirmative defense is not supported by the requisite evidence. The mere variation from the customary order of presentation would not constitute an abuse of discretion under such circumstances.

²¹ 42 PERB ¶ 3023, at 3090.

²² *County of Franklin*, 48 PERB ¶ 3025, 3096 (2015); *County of Orleans*, 25 PERB ¶ 3010, n. 2 at 3029 (1992); *City of Elmira (PBA)*, 41 PERB ¶ 3018, 3084 (2008); *Nanuet Union Free Sch Dist*, 17 PERB ¶ 3005; *Bd of Ed of the City Sch Dist of the City of Buffalo and Buffalo Teachers Fed*, 26 PERB ¶ 3019 (1993); *New York State Security and Law Enforcement Employees, Council 82, AFSCME (Fronczak)*, 29 PERB ¶ 3015 (1996); *Amalgamated Transit Union, Division 580, AFL-CIO (Farella)*, 32 PERB ¶ 3053 (1999).

In particular, the revealing of the gravamen of relevant testimony through an offer of proof works no cognizable harm on either party; “[t]he purpose of litigation is to achieve a just result and not to spring surprise on one's adversary.”²³ Consistent with this is the fact that, pursuant to §§ 204.1 and 204.3 of the Rules, both the charge and the answer must provide “a clear and concise statement of the facts” supporting the elements of the charge and any affirmative defenses in the answer.²⁴

We note that our cases allowing offers of proof do not constitute a universal endorsement of their use in all circumstances. Rather, where, upon a review of the pleadings, the material facts do not appear to be sufficiently in dispute to warrant a hearing, but a hearing is nonetheless sought, an offer of proof can assist in discerning if a hearing is appropriate. Moreover, where, as here, the issues presented are relatively narrow—whether information requested is properly required to be produced—and the parties’ factual assertions do not appear to be broadly irreconcilable, an offer of proof or an exchange of offers of proof may be useful. The ALJ’s soliciting offers of proof in the current circumstances does not, on its face, appear to be inappropriate. We agree with the State, however, that the ALJ’s June 5, 2015 letter did not suffice to put the State on notice that its offer of proof should include its defenses and affirmative defenses.

Although the June 5, 2015 letter expressly states that, after receiving PEF’s offer of proof and the State’s response, “I will then make my determination in writing, or if further

²³ *239 Mulberry, LLC v Anglisano*, 51 Misc3d 869, 872 (Civ Ct NY City 2016) (quoting *Zayas v Morales*, 45 AD2d 610, 613 (2d Dept 1974). As the court noted in *239 Mulberry*, the courts have followed a “policy against surprise in litigation dating back to at least 1922.” *Id.* citing *Eagle–Picher Lead Co. v Mansfield Paint Co., Inc.*, 203 AD 9, 12 (3d Dept 1922). We note that, of course, no party has asserted an interest in surprise in this matter.

²⁴ Moreover, pursuant to § 204.3 of the Rules, either the respondent or the petitioner can move for particularization of, respectively, either the charge or answer, if the factual basis of either the charge or any affirmative defenses in the answer is “so vague and indefinite” that it cannot reasonably be addressed. That this motion is not the sole vehicle by which amplification of the facts may be sought is established by the long-established use of offers of proof before ALJs.

information is needed reconvene a hearing in the future,” the letter gives the State twenty-one (21) business days to “respond” to PEF’s offer of proof. The State may reasonably have taken that to limit its obligation to addressing only the case laid out in PEF’s offer of proof.

Because the ALJ’s notice to the parties was insufficient, we find that the ALJ erred by deciding the case based solely on the offer of proof and the response thereto. Moreover, for the reasons stated below, we also vacate the ALJ’s decision on the merits.

We agree with the State that the ALJ did not apply the applicable standard. Because the record does not clearly resolve the issues before us, we vacate the ALJ’s decision and remand for further proceedings.

As we explained in *County of Montgomery*:

For close to four decades, we have held that under the Act an employee organization has a general right to receive documents and information requested from an employer for use by the employee organization in the administration of a collectively negotiated agreement including processing a grievance and preparing for a grievance hearing and/or arbitration. Failure of an employer to produce requested information and documents may constitute a violation of both §§209-a.1(a) and (d) of the Act.²⁵

That duty “includes an obligation on the part of the employer to provide information relevant to a union’s investigation of the merits of a grievance.”²⁶ Moreover, “an employee organization is entitled to a reasonable opportunity to examine requested information and documents before determining whether to continue to process a grievance,” and the “right to receive information and documents extends after a

²⁵ 44 PERB ¶ 3045, 3134 (2011), citing, *inter alia*, *Bd of Ed, City Sch Dist of the City of Albany*, 6 PERB ¶ 3012 (1973); *Hornell Cent Sch Dist*, 9 PERB ¶ 3032 (1976); *City of Rochester*, 29 PERB ¶ 3070 (1996).

²⁶ *County of Erie v State*, 14 AD3d 14, 37 PERB ¶ 7007, 7015 (2004), citing *Matter of Schuyler–Chemung–Tioga BOCES*, 34 PERB ¶ 3019 (2001); *State of New York (Department of Health & Roswell Mem Inst)*, 26 PERB ¶ 3072 (1993).

grievance has been processed to arbitration.”²⁷

We have long held that “the general right to receive requested documents and information is subject to three primary limitations: reasonableness, which includes the burden on the responding party; relevancy; and necessity.”²⁸ This duty may, where appropriate, prevail over confidentiality rights under statutes other than the Act.²⁹ In such cases, we have further held that “prior to refusing to disclose information under the Act based upon a claim of confidentiality, a respondent is obligated to first engage in good faith negotiations for the purpose of reaching an agreed-upon accommodation concerning the requested information.”³⁰

In her decision, the ALJ did not address these factors, but rather found that “the investigation of discrimination and therefore the [Hamer] report pertained to Piller” under the PPPL.³¹ That PPPL analysis is simply not relevant to the question of *PEF*’s right under the Act to request information to enable it to investigate and evaluate a grievance on Piller’s behalf. As to the analysis under the Act, the ALJ did not balance the respective interest of the parties, nor, apparently review the report *in camera*, but only found that “the findings of the report may be relevant to the underlying charge in the

²⁷ *County of Montgomery*, 44 PERB ¶ 3045, at 3134, citing *Greenburgh No. 11 Union Free Sch Dist*, 33 PERB ¶ 3059 (2000).

²⁸ *Utica City School Dist*, 48 PERB ¶ 3008 (2015), citing *Hampton Bays Union Free Sch Dist*, 41 PERB ¶ 3008, 3051 (2008), *confirmed sub nom. Hampton Bays Union Free Sch Dist v Pub Empl Relations Bd*, 62 AD3d 1066 (3d Dept 2009)), *lv denied*, 13 NY3d 711 (2009); *Bd of Ed, City Sch Dist of the City of Albany*, 6 PERB ¶ 3012 (1973); see also *State of New York (OMRDD)*, 38 PERB ¶ 3036 (2005), *confirmed sub nom. CSEA v New York State Pub Empl Relations Bd*, 14 Misc3d 199, 39 PERB ¶ 7009 (2006), *affd*, 46 AD3d 1037, 40 PERB ¶ 7009 (3d Dept 2007).

²⁹ *State of New York (OMRDD)*, 38 PERB ¶ 3036, 3126 (2005), *confirmed sub nom. CSEA v New York State Pub Empl Rel Bd*, 14 Misc3d 199, 39 PERB ¶ 7009 (2006), *affd*, 46 AD3d 1037, 40 PERB ¶ 7009 (3d Dept 2007); *Hampton Bays Union Free Sch Dist*, 41 PERB ¶ 3008, at 3051-3052.

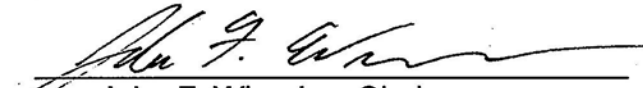
³⁰ *County of Erie*, 45 PERB ¶ 3036 (2012).

³¹ 49 PERB ¶ 4503, at 4503-4504.

grievance.”³² Nor did the ALJ address whether the information was available elsewhere, or whether the parties had endeavored to, or could reasonably, accommodate PEF’s need for disclosure without entirely sacrificing the confidentiality grounds asserted by the State.³³ With such fact-driven questions unanswered, and the answers unable to be gleaned from the record before us, we vacate the ALJ’s decision.

Accordingly, we deny in part and grant in part the State’s exceptions, vacate the ALJ’s decision and remand for further proceedings consistent with this opinion by a new ALJ to be assigned in due course.³⁴

DATED: April 10, 2017
Albany, New York


John F. Wirenius, Chairperson


Allen C. DeMarco, Member


Robert S. Hite, Member

³² *Id. Compare State (OMRDD)*, 38 PERB ¶ 3036, at 3126.

³³ *Utica City School Dist*, 48 PERB ¶ 3008, at 3026; *County of Erie*, 45 PERB ¶ 3036, at 3085.

³⁴ We do not intend to bind the newly assigned ALJ to the procedural vehicles employed by her predecessor. We leave open to the successor ALJ whether to proceed directly to a hearing or to narrow the issues via new offers of proof, or in any other way permitted by our Rules.

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

**SUFFOLK COUNTY DEPUTY SHERIFFS POLICE
BENEVOLENT ASSOCIATION,**

Charging Party,

-and-

CASE NO. U-32331

COUNTY OF SUFFOLK,

Respondent,

-and-

SHERIFF OF SUFFOLK COUNTY,

Respondent,

-and-

**SUFFOLK COUNTY POLICE BENEVOLENT
ASSOCIATION, INC.**

Intervenor,

-and-

**SUFFOLK COUNTY POLICE SUPERIOR OFFICERS
ASSOCIATION,**

Intervenor.

**GREENBERG BURZICHELLI GREENBERG, P.C. (SETH H. GREENBERG and
GENEVIEVE E. PEEPLES of counsel), for Charging Party**

**LAMB & BARNOSKY, LLP (RICHARD K. ZUCKERMAN of counsel), for
Respondent County of Suffolk**

**BOND SCHOENECK & KING, PLLC (CHRISTOPHER T. KURTZ and TERRY
O'NEIL, of counsel), for Respondent Sheriff of Suffolk County**

**DAVIS & FERBER, LLP (DAVID A. DAVIS & ALEX J. KAMINSKI of counsel),
for Intervenor Suffolk County Police Benevolent Association, Inc.**

**CERTILMAN BALIN ADLER & HYMAN, LLP (PAUL S. LINZER & JENNIFER
A. BENTLEY of counsel), for Intervenor Suffolk County Police Superior
Officers Association**

BOARD DECISION AND ORDER

On March 28, 2016, the Suffolk County Police Benevolent Association, Inc. (SCPBA) and the Suffolk County Police Superior Officers Association (SOA) separately filed motions, pursuant to § 212.4 (h) of PERB's Rules of Procedure (Rules), for leave to file exceptions to a March 4, 2016 letter issued by an Administrative Law Judge (ALJ) confirming the results of a conference held on February 29, 2016, and ordering the parties to present evidence at a hearing, "including any evidence alleged to be relevant to the issue of deferral, PERB's jurisdiction, and the merits of the charge." SCPBA and SOA included their exceptions to the ALJ's letter with their motions. The County of Suffolk (County) supports the motions and exceptions, while the Suffolk County Deputy Sheriffs Police Benevolent Association (DSPBA) opposes the motions and exceptions.

On April 22, 2016, DSPBA filed a motion for leave to file cross-exceptions to the ALJ's letter along with its cross-exceptions. SCPBA, SOA, and the County oppose the DSPBA's motion and exceptions. The Sheriff of Suffolk County (Sheriff) did not file a response to any of the motions.

PROCEDURAL BACKGROUND

On November 12, 2012, DSPBA filed an improper practice charge alleging that the County and the Sheriff violated § 209-a.1 (d) of the Public Employees' Fair Employment Act (Act) by unilaterally transferring to members of SOA and SCPBA the

exclusive unit work of highway patrol and enforcement functions on the Long Island Expressway and Sunrise Highway. The County denied the material allegations in the charge and raised the defenses of failure to name and serve necessary parties, duty satisfaction and deferral. The Sheriff filed an answer admitting the material allegations of the charge and alleging that the County, and not the Sheriff, unilaterally assigned the work, and seeking indemnification from the County for its conduct. The ALJ granted motions by SOA and DSPBA to intervene and each filed an answer denying the material allegations of the charge and arguing that the charge should be deferred. The ALJ held a hearing on December 5, 2013, at which time the parties were given an opportunity to present evidence regarding the issue of deferral. The parties subsequently filed briefs addressing that issue.

On June 3, 2014, the ALJ issued a decision deferring and conditionally dismissing DSPBA's improper practice charge.¹ DSPBA filed exceptions to the ALJ's decision, and the County filed cross-exceptions.

On January 25, 2016, the Board issued a decision reversing the ALJ's decision and remanding the matter to the ALJ for further proceedings.² The Board's decision found that the ALJ's ruling on deferral was "premature" and stated that the ALJ was required to:

. . . make a finding as to whether the County has acted inconsistently with the prerequisites for deferral, or repudiated the DSPBA agreement and if so, whether the County's actions would render deferral a meaningless act. If the ALJ finds that to be the case, then a determination on the merits of the charge should

¹ 47 PERB ¶ 4553 (2014).

² 49 PERB ¶ 3005 (2016).

follow.³

On March 4, 2016, the ALJ issued a letter “confirm[ing] the results of the conference held on February 29, 2016.” The letter also scheduled a hearing at which the parties were advised that “they shall present evidence regarding all issues raised regarding this matter and as remanded by the Board, including any evidence alleged to be relevant to the issue of deferral, PERB’s jurisdiction, and the merits of the charge.”

Subsequently, on December 8, 2016, the ALJ issued another letter stating that, “[h]aving reconsidered the pleadings, papers, and the Board’s decision, I have determined that the questions of deferral and PERB’s jurisdiction should be heard first” and scheduling a hearing for April 7, 2017.

MOTIONS FOR LEAVE TO FILE EXCEPTIONS

In their motions for leave to file exceptions and in their exceptions, SCPBA and SOA argue that the ALJ erred in applying the Board’s January 25, 2016 Order. SCPBA and SOA argue that the Board’s Order requires the ALJ to make a determination on deferral, and the included issue of repudiation, prior to conducting a hearing on the merits of the charge. SCPBA and SOA argue that the ALJ’s failure to make a determination on deferral prior to conducting a hearing on the merits will result in substantial wasted efforts by the parties, and that an interlocutory appeal is appropriate because the ALJ’s decision cannot be adequately reviewed at a later stage in the proceedings.

In its motion for leave to file cross-exceptions and in its cross-exceptions, DSPBA argues that the ALJ erred by permitting reconsideration of the same deferral arguments

³ Id., at 3021, 3022.

made by the County, SCPBA, and SOA, despite a final decision on those arguments by the Board in its January 25, 2016 Order. DSPBA argues that the ALJ should have simply ordered a hearing on the merits of the underlying charge to go forward and that extraordinary circumstances exist because a hearing on the deferral issue would further delay the adjudication of the underlying improper practice charge and would unfairly require DSPBA to relitigate that which was already decided by the Board and subsequently reaffirmed by the ALJ at the February 2016 conference among the parties.

DISCUSSION

As we have consistently held, we will not grant leave to file interlocutory exceptions to non-final rulings and decisions unless the moving party demonstrates extraordinary circumstances.⁴ The reasoning underlying the extraordinary circumstances standard is the recognition that it is far more efficient for the Board and the parties to await a final disposition of the merits of a charge before examining interim determinations. The improvident grant of leave results in unnecessary delays in the final resolution of the factual and legal issues raised by an improper practice charge or representation petition. As a result, the Board has consistently rejected the majority of requests for permission to file exceptions.⁵

⁴ *Mt Morris Cent Sch Dist*, 26 PERB ¶ 3085, 3165-3166 (1993); *Town of Shawangunk*, 29 PERB ¶ 3050, 3115 (1996); *Council 82, AFSCME*, 32 PERB ¶ 3040, 3089 (1999); *UFT (Grassel)*, 32 PERB ¶ 3071, 3168 (1999); *City of Newburgh*, 33 PERB ¶ 3031, 3084 (2000); *State of New York (Division of Parole)*, 40 PERB ¶ 3007, 3019 (2007); *Hyde Leadership Charter School – Brooklyn*, 47 PERB ¶ 3022, 3063 (2014).

⁵ *Town of Shawangunk*, 29 PERB ¶ 3050, at 3115; *State of New York (Division of Parole)*, 40 PERB ¶ 3007, at 3019.

We first address the motions filed by SCPBA and SOA. We find that SCPBA and SOA have failed to demonstrate extraordinary circumstances warranting the grant of interlocutory appeal because we find that both motions are moot. Although the ALJ's March 4, 2016 letter stated that the parties were to present evidence relevant to the issue of deferral, PERB's jurisdiction, and the merits of the charge at the hearing, the ALJ subsequently reconsidered her decision. The ALJ's December 8, 2016 letter (issued after SCPBA and SOA had filed their motions for leave to file exceptions) scheduling the matter for hearing on April 7, 2017, states that questions of deferral and PERB's jurisdiction will be heard first. It therefore appears that the ALJ has granted the relief requested by SCPBA and SOA, and there is not actually a live controversy to be decided. Therefore, in these circumstances, we deny SCPBA and SOA's motions for leave to file exceptions.

We next address DSPBA's motion for leave to file cross-exceptions. We find that DSPBA has failed to demonstrate extraordinary circumstances warranting the grant of interlocutory appeal of the ALJ's March 4, 2016 letter. Contrary to DSPBA's argument, the Board's January 25, 2016 decision was not a final ruling on the appropriateness of deferral. Instead, as explained above, the Board's decision remanded the proceeding to the ALJ, finding that the ALJ's ruling on deferral was "premature" and stating that the ALJ was required to:

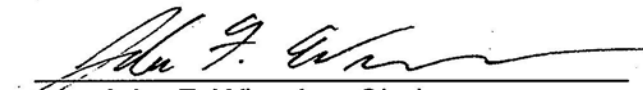
make a finding as to whether the County has acted inconsistently with the prerequisites for deferral, or repudiated the DSPBA agreement and if so, whether the County's actions would render deferral a meaningless act. If the ALJ finds that to be the case, then a determination on the merits of the charge should

follow.⁶

Moreover, the Board explicitly stated that “deferral may be appropriate in this matter, but not yet.”⁷ Further, DSPBA’s claim that the ALJ “reaffirmed” that deferral was inappropriate at the February 2016 conference among the parties is belied by the ALJ’s March 4, 2016 letter summarizing the parties’ discussions during the February 2016 conference and scheduling a hearing, at which the parties were advised that they were to present evidence on, among other things, the issues of deferral and PERB’s jurisdiction. In sum, DSPBA’s motion mischaracterizes the record and fails to demonstrate extraordinary circumstances warranting the grant of interlocutory appeal.

Based upon the foregoing, we deny SCPBA’s, SOA’s, and DSPBA’s motions for leave to file exceptions and remand the case to the ALJ for further processing consistent with this decision and her December 8, 2016 letter to the parties.

DATED: April 10, 2017
Albany, New York


John F. Wirenius, Chairperson


Allen C. DeMarco, Member


Robert S. Hite, Member

⁶ 49 PERB ¶ 3005, at 3021, 3022.

⁷ Id. at 3022.

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

**TOWN OF ULSTER POLICEMEN'S
BENEVOLENT ASSOCIATION, INC.,**

Charging Party

CASE NO. U-32620

- and -

TOWN OF ULSTER,

Respondent.

MARILYN D. BERSON, ESQ., for Charging Party

**ROEMER WALLENS GOLD & MINEAUX, LLP (ANNA E. REMET of counsel),
for Respondent**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Town of Ulster (Town) to a decision and order of an Administrative Law Judge (ALJ) finding that the Town violated § 209-a.1 (d) of the Public Employees' Fair Employment Act (Act) when it unilaterally transferred to the Town Attorney unit work that had been exclusively performed by police officers employed by the Town and represented by the Town of Ulster Policemen's Benevolent Association, Inc. (PBA). The at-issue work consists of the prosecution of initial court appearances for vehicle and traffic law tickets that the police officers issued.¹

EXCEPTIONS

The Town filed four exceptions. It argues that the ALJ incorrectly: (1) found that

¹ 48 PERB ¶ 4603 (2015).

the work performed by the Town Attorney is substantially similar to that performed in the past by bargaining-unit police officers; (2) failed to give sufficient weight to the change in job qualifications; (3) found that the Town's interests are not sufficient to outweigh the interests of bargaining-unit employees represented by the PBA under the framework established in *Niagara Frontier Transportation Authority*,² and (4) found that the transfer of work was attributable to the Town.

The PBA filed a response supporting the ALJ's decision.

Having reviewed the record and considered the parties' arguments, we reverse the ALJ's decision.

FACTS

The facts are fully set forth in the ALJ's decision and are discussed here only as far as is necessary to address the exceptions. The PBA is the exclusive bargaining agent for a unit of Town employees consisting of approximately 28 full-time and part-time police officers, five sergeants, and one lieutenant. For at least 14 years, bargaining unit police officers exclusively performed the prosecutorial function associated with initial court appearances for alleged vehicle and traffic law violations arising from tickets they had written.³ Court appearances for police officers occurred one to three times per month for each officer. For a court appearance outside of an officer's regular shift, the officer received three hours' pay at time-and-one-half, or, at the officer's option, 4.5 hours of compensatory leave time, which the officer was allowed

² 18 PERB ¶ 3083, 3182 (1985).

³ Article 18 of the New York County Law empowers the District Attorney to prosecute all crimes within the County and to delegate this responsibility regarding the prosecution of traffic offenses. *People v Soddano*, 86 NY2d 727, 728 (1995).

to bank and use at a later date.

It was standard practice for police officers to meet with the ticketed driver and engage in plea bargaining. Before making any type of plea offer, the officer would review the driving abstract of the ticketed individual in conjunction with the nature of the pending violation to ensure the appropriateness of any potential plea arrangement. On most occasions, tickets were resolved through plea bargaining.⁴ On the rare occasion when a plea was not entered, the officer would serve as trial prosecutor later that same day.⁵

In January of 2013, prior to the start of a PBA membership meeting, the Town's Chief of Police, Anthony Cruise, advised the officers in attendance that "there was going to be a change."⁶ Cruise said that he had met with Town Supervisor James Quigley, and that "the Supervisor indicated that there will be a Special Prosecutor handling traffic tickets and the Town needs to save money."⁷ The Chief thereafter sent an email to all unit officers, dated January 8, 2013, in which he stated, in relevant part, that "[e]ffective this date, Members will no longer appear at the Town of Ulster Court for Vehicle and Traffic Trials scheduled for their 1st Appearance notices."⁸

Consistent with the Chief's communications, Town Attorney Jason Kovacs was appointed as the "Town Prosecutor" pursuant to a Town Board resolution dated January 3, 2013.⁹ On January 4, 2013, Kovacs hand-delivered a letter to the District Attorney

⁴ Tr, at pp. 25, 27.

⁵ Tr, at p. 20.

⁶ Tr, at p. 28.

⁷ *Id.*

⁸ Joint Ex 2.

⁹ Joint Ex 3.

indicating that it was his understanding that he needed “a letter from your office whereby you delegate your prosecutorial authority to me to handle [Vehicle and Traffic Law violations].”¹⁰ By letter dated January 7, 2013, the District Attorney wrote to Quigley authorizing Kovacs to act as the Town’s prosecutorial agent to handle “vehicle and traffic offenses in the Town of Ulster, excluding vehicle and traffic misdemeanors and/or alcohol related offenses.”¹¹ Since receiving the designation letter, Kovacs has performed the work of prosecuting initial court appearances for vehicle and traffic law tickets.

John Crotty, an attorney retained by the PBA to draft and file the charge in this matter, testified on behalf of the PBA about a telephone conversation he had with the District Attorney sometime in August of 2013. According to Crotty, in that conversation the District Attorney indicated that his letter authorizing Kovacs to act as the Town’s prosecutorial agent was written at the request of Quigley, who had specifically asked him to appoint Kovacs.¹² Crotty testified that the District Attorney told him that, but for the Town’s request, the District Attorney would not have changed the longstanding system for prosecuting tickets in the Town, and said that “he didn’t have any issue with the way things had been going on for a very long time nor did he have a problem with the appointment of Mr. Kovacs so long as it didn’t cost his department any money.”¹³

¹⁰ Joint Ex 4.

¹¹ Joint Ex 1.

¹² Tr, at p. 66.

¹³ Tr, at pp. 66, 67.

DISCUSSION

Ordinarily, when a charge alleges that a transfer of unit work violates § 209-a.1 (d) of the Act, we apply the framework established in *Niagara Frontier* and its progeny, as did the ALJ here.¹⁴ However, because the ultimate decision to transfer the unit work here was made by the District Attorney, a legally and factually separate entity outside of the employment relationship, absent any constraint from the Town, we find that the Town cannot be held legally responsible for the transfer.

Our decision is guided by the reasoning in *City of New York*.¹⁵ In that case, a long-standing practice existed whereby police officers, both on and off duty, received free transportation on City subways and buses. The subways and buses were owned by the City but operated by the New York City Transit Authority (NYCTA), a separate legal entity.¹⁶ The City was responsible for NYCTA's capital expenditures, and the City, State, and Federal governments subsidized NYCTA's operating costs.¹⁷

On July 31, 1975, the City's Mayor announced a "program of recovery" to combat the City's fiscal crisis. The Mayor's announcement stated:

"I have consulted with the Chairman of the Metropolitan Transportation Authority

¹⁴ 18 PERB ¶ 3083, at 3182. See also *Manhasset Union Free Sch Dist*, 41 PERB ¶ 3005 (2008), *confirmed and mod, in part, Manhasset Union Free Sch Dist v New York State Pub Empl Relations Bd*, 61 AD3d 1231, 42 PERB ¶ 7004 (3d Dept 2009), *on remittitur*, 42 PERB ¶ 3016 (2009), *Greater Amsterdam CSD*, 49 PERB ¶ 3011, 3046 (2016); *Town of Riverhead*, 42 PERB ¶ 3032, 3119 (2009); *Town of Stony Point*, 45 PERB ¶ 3045, 3115 (2012).

¹⁵ 9 PERB ¶ 3076 (1976), *confirmed sub nom. Melnick v New York State Pub Empl Relations Bd*, 57 AD2d 747, 10 PERB ¶ 7009 (1st Dept 1977). The decision of the Director of Employment Practices and Representation, appearing at 9 PERB ¶ 4522 (1976) contains a full description of the facts.

¹⁶ NYCTA was governed by a board consisting of the members of the Metropolitan Transportation Authority. 9 PERB ¶ 4522, at 4575.

¹⁷ *Id.*

and he is prepared to recommend to his board that subway and bus fares be increased

I have also called upon the Metropolitan Transportation Authority to cut its costs, as the City has, to achieve the economies required of all in this time of crisis . . . everyone who uses mass transit facilities should pay a fare. Now, all uniformed personnel and Transit Authority employees are granted privileged status. No one is entitled to a free ride for personal transportation under today's conditions."¹⁸

On the same day, NYCTA issued a resolution which increased fares and incorporated some of the suggestions of the Mayor. NYCTA continued the practice of carrying uniformed police officers and NYCTA employees without charge, but it discontinued the practice of carrying police officers not in uniform.¹⁹

The Board affirmed the decision of the Director of Public Employment Practices and Representation finding that the City did not commit an improper practice by unilaterally withdrawing free subway and bus transportation privileges. Despite the evidence that NYCTA received considerable subsidization from the city and despite the proximate relationship of the Mayor's suggestion to NYCTA's action, the Board found that the decision to terminate bus and subway transportation was made solely by NYCTA and that the City was not responsible for the action taken by NYCTA.²⁰

We find the facts in the instant case to be strikingly similar to those in *City of New York*, and we find that the outcome should likewise be the same. In both cases, the employer requested that a third party make a change that affected the employer's unit employees, but that the employer could not bring about on its own. In both cases, the third party complied with the employer's request.

¹⁸ *Id.*

¹⁹ 9 PERB ¶ 3076, at 3138.

²⁰ 9 PERB ¶ 3076, at 3138-3139.

The evidence in the current case demonstrates that the District Attorney would not have taken any action absent the Town's request that he delegate authority to the Town Attorney. The same, however, appeared to be the case in *City of New York*, where there was no evidence that any factors, besides the Mayor's suggestion, motivated NYCTA to cut free services to non-uniformed police officers. Further, the Town had no ability to force the District Attorney to make the change, and there is no evidence of coercion or any sort of *quid pro quo* motivating the District Attorney's actions.²¹

As in *City of New York*, we find that the Town's request to the District Attorney to take action is an insufficient basis on which to hold the Town responsible for the District Attorney's actions.²² As a matter of law and of fact, the Town does not control the District Attorney and does not dictate to the District Attorney decisions about prosecuting traffic tickets in the Town.²³ Moreover, since it was the District Attorney, not the Town, who was ultimately responsible for the work of prosecuting traffic tickets, "there was no Taylor Law obligation on the [Town] to insure its continuance or, conversely, not to request its discontinuance."²⁴

Based on the foregoing, we reverse the decision of the ALJ.

²¹ There was at least a suggestion of some coercion in *City of New York*, given that the City provided "considerable subsidization" to NYCTA and owned NYCTA's equipment. Nevertheless, the Board found that such was insufficient to convince the Board that NYCTA's decision was not an independent one. 9 PERB ¶ 3076, at 3138.


²² *Cf. County of Chautauqua*, 21 PERB ¶ 3057, 3125-3126 (1988) (finding employer was responsible for transfer of work to non-unit employees where employer had the authority to prevent the transfer, the transfer could not have taken place without the employer's consent, and the employer actively facilitated the transfer of work).

²³ *City of New York*, 9 PERB ¶ 4522, at 4577.

²⁴ *Id.*

IT IS, THEREFORE, ORDERED that the charge must be, and hereby is,
dismissed.

DATED: April 10, 2017
Albany, New York


John F. Wirenius, Chairperson


Allen C. DeMarco, Member


Robert S. Hite, Member

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

CITY OF WATERTOWN,

Petitioner,

CASE NO. – A2016-132

- and -

**WATERTOWN PROFESSIONAL FIREFIGHTERS
ASSOCIATION, LOCAL 191,**

Respondent.

**BOND, SCHOENECK & KING, PLLC (TERRY O'NEIL, ESQ., of counsel), for
Petitioner**

**BLITMAN & KING, LLP (NATHANIEL G. LAMBRIGHT, ESQ., of counsel),
for Respondent**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the City of Watertown (City) to a letter ruling by the Director of Conciliation (Director) dated September 21, 2016,¹ denying the City's application to hold in abeyance the processing of a grievance filed by the Watertown Professional Firefighters Association, Local 191 (Association), pending appellate review of a Supreme Court decision denying the City's challenge to arbitrability.²

EXCEPTIONS

The City excepts to the Director's letter rulings "compel[ling] the City to continue with the arbitration selection process" and, more specifically, to the requirement that the City "submit its rankings of the panel" by a specified date, or waive its right to participate

¹ Exceptions, Ex 11. The City also excepts to the Director's September 22, 2016 letter ruling denying the City's application to reconsider that initial ruling. Exceptions, Ex 13.

² Exceptions, Ex 13.

in the selection process.³ The City further excepts to the Director's declaration that, "absent an order enjoining PERB from performing its administrative function under the Voluntary Grievance Arbitration Rules of Procedure, processing of this matter will resume."⁴

The City argues that the Director erred in that the Agency was bound to apply §5519 (a) of the Civil Practice Law and Rules (CPLR), which provides for an automatic stay of "all proceedings to enforce the judgment or order appealed from pending the appeal" applicable when "the appellant or moving party is the state or any political subdivision of the state" under § 5519 of the CPLR.

Further, the City contends, based solely upon private sector precedent, that "if the City does act or engages in the arbitration process in any way, it waives its right to contest arbitrability and its appeal is mooted."⁵ In particular, the City asserts that "[t]he right to a stay of arbitration will be considered waived where a party participates in the designation of arbitrators."⁶

The City finally argues that the Director has misconstrued § 207.6 of our Rules of Procedure (Rules), which requires the Director to "hold in abeyance the designation of the arbitrator pending final court determination of the arbitrability question." The City maintains that this provision does not permit designation of an arbitrator until the judicial process is complete, including any appellate review of a Supreme Court decision on the issue of arbitrability.

³ Exceptions ¶ 1.

⁴ *Id.*, at ¶ 2.

⁵ Brief in Support of Exceptions (Brief), at p 7, citing CPLR § 7503; *Tucker Anthony, Inc. v Blunt, Ellis & Lowe*, 260 AD2d 386 (2d Dept 1999).

⁶ *Id.*, quoting *Mid-Atlantic Constr Corp v Guido*, 30 AD2d 232, 237 (4th Dept 1968).

The Association did not file any opposition to the City's exceptions. The Board granted the City's request for oral argument by letter dated December 13, 2016. Oral argument, at which both parties appeared, was conducted on January 24, 2017. The City presented arguments in support of its exceptions, while the Association argued that the Director's decision should be upheld.

Having considered the record and the arguments of the parties, including those presented at oral argument, we deny the exceptions in part, grant them in part, and reverse the Director's determination for the reasons set forth below.

FACTS

The instant dispute is governed by the parties' collective bargaining agreement (Agreement), which provides for arbitration pursuant to Part 207 of our Rules.⁷ On or about May 26, 2016, the Association filed a grievance claiming that the City violated, among other sources of right, the Agreement, "when [it] failed to operate and maintain 'organizational structure and staffing' levels as defined and/or referenced in the Agreement, the rules, Standard Operating Procedures, and regulations."⁸

After unsuccessfully pursuing the grievance through the initial stages of the parties' contractual grievance procedure, the Association filed a demand for arbitration on or about July 8, 2016, pursuant to our voluntary grievance arbitration rules of procedure, over the City's requiring employees in the title Firefighters to perform the work of employees in the title Captain and its demotion of five employees from Captain

⁷ Brief, Ex 1, at Art 3 § 1; at all relevant times, the Agreement, although expired, remained in status quo pursuant to § 209-a.1 (d) of the Public Employees Fair Employment Act.

⁸ Brief, Ex 2.

to Firefighter.⁹ On July 26, 2016, the City moved, by order to show cause, the Supreme Court, Jefferson County, for a permanent stay of the Association's arbitration.¹⁰

The City provided a copy of the signed Order to Show Cause to PERB's Office of Conciliation, receipt of which was acknowledged on July 27, 2016. In the letter acknowledging receipt of the order, the Office of Conciliation informed the parties that "[w]e shall hold in abeyance the arbitration proceeding until final court determination," citing § 207.6 of the Rules.¹¹

By order dated September 1, 2016, the Supreme Court granted the stay of arbitration as to the out-of-title work claim, but denied it as to the claim arising out of the demotion of the eight captains.¹² The Association's counsel provided a copy of the order to the Office of Conciliation with a cover letter dated September 7, 2016, requesting that the arbitration be processed, and adding that "[t]ime is of the essence in this matter."¹³

One week later, the City filed a notice of appeal.¹⁴ On September 16, 2016, the City provided a copy of the notice of appeal to the Office of Conciliation, and requested confirmation that "PERB will hold the processing of this matter in abeyance pending

⁹ Brief, Ex 4. See Rules, Part 207. On July 25, the City filed an improper practice charge against the Association asserting that the Association's failure to provide the requested information and its specification of its facts in the demand for arbitration violated the duty to negotiate in good faith under § 209-a.2 (b) of the Public Employees' Fair Employment Act. Brief, Ex 5. We do not address or in any way opine as to the allegations of the improper practice charge, which is currently pending before an Administrative Law Judge.

¹⁰ Brief, Ex 6, *City of Watertown v Watertown Prof'l Firefighters Assn*, L 191, Index No. 1508/2016 (McClusky, J).

¹¹ Brief, Ex 7.

¹² Brief, Ex 8.

¹³ *Id.*

¹⁴ Brief, Ex 9.

final judicial resolution as to the issue of arbitrability,” pursuant to § 207.6 of the Rules.¹⁵

On September 21, 2016, the Director replied to the City’s request, stating that:

This Office considers the decision a final court determination within the meaning of Section 207.6(c) of PERB’s Rules of Procedure. At this point, absent an order enjoining PERB from performing its administrative function under the Voluntary Grievance Arbitration Rules of Procedure, processing of this matter will resume.¹⁶

Given your response . . . was timely but insufficient, I will allow you to return your rankings of the panel selection list dated July 19, 2016 to this office no later than October 3, 2016. Please be advised should I not receive your rankings within this time frame, I will resume processing the Demand for Arbitration and under §207.7(c)(2) of PERB’s Rules, designate the arbitrator according to the preferences of the party whose selections were timely.

On September 22, 2016, the Director refused the City’s request, submitted that date, to reconsider his decision. As a result of the filing of the City’s exceptions, the Director’s order is stayed pending our decision.¹⁷

DISCUSSION

The City’s exceptions relying on CPLR § 5519 are unpersuasive, as neither the Board nor any of its agents were joined as a party to the proceeding challenging arbitrability, and, in fact, are neither necessary or proper parties to that proceeding.¹⁸ Moreover, as a prerequisite to seeking judicial review of the Director’s decision, the City was required to exhaust its administrative remedies by appealing the Director’s decision

¹⁵ Brief, Ex 10.

¹⁶ Brief, Ex 11.

¹⁷ *Board of Ed of the City Sch Dist of the City of New York*, 45 PERB ¶ 3018, 3044 (2012).

¹⁸ *See Albany Permanent Prof Firefighters Assn v Corning*, 51 AD2d 386, 390 (3d Dept 1975), *affd sub nom. Caso v Coffey*, 41 NY2d 153 (1976).

to the Board, as it has done here.¹⁹ As the court did not have either personal jurisdiction over the Board or any of its agents or subject matter jurisdiction to review the Director's decision, we do not believe that the automatic stay under CPLR § 5519 is a proper procedural vehicle through which the City can challenge the Director's decision.

However, we find that the City's exceptions to the Director's interpretation and application of § 207.6 of our Rules are meritorious. Although the issue presents a question of first impression for the Board, the Director was following a long-established practice of the Office of Conciliation, interpreting the language of the Rule as providing for a stay only until the court of first instance had rendered a final judgment, and not through appellate review of such order and judgment. For the reasons given here, we decline to adopt that interpretation of § 207.6 of the Rules, and, accordingly, vacate the Director's September 21, 2016 decision and the September 22, 2016 letter denying reconsideration of that decision.

As a threshold matter, we note that, as the Court of Appeals has recently reaffirmed, "[t]he tenets of statutory construction apply equally to administrative rules and regulations."²⁰ Accordingly, we begin with the plain meaning of the relevant provision of our Rules.²¹ Section § 207.6 (c) states, in pertinent part, that "[u]pon timely receipt of a copy of the application to stay arbitration, the director of conciliation shall hold in abeyance the designation of the arbitrator pending final court determination of

¹⁹ CSL § 213; *Matter of Jardim v New York State Pub Empl Relations Bd*, 177 Misc2d 528 (Sup Ct NY Co 1998), *affd*, 265 AD2d 329 (2d Dept 1999); *Hanley v Curreri*, 16 Misc3d 1130(A), 40 PERB ¶ 7002 (Sup Ct Albany Co 2007).

²⁰ *Springer v Bd of Educ of the City Sch Dist of the City of NY*, 27 NY3d 102, 107 (2016), *citing Matter of Cortland-Clinton, Inc v New York State Dept of Health*, 59 AD2d 228, 231 (4th Dept 1977).

²¹ *Id.* ("We construe the regulation in accordance with its plain language").

the arbitrability question.”

We find that the Director’s limitation of the stay of proceedings under the Rule to such time as the court of first instance reaches its final order, thereby eliminating any stay of proceedings during a pending appeal, does not construe the Rule’s language by its natural and most obvious meaning, but is, in this context, artificial and forced.²²

While there are cases in which the phrase “final determination” is used to refer to the final decision reached by a lower court,²³ a far more natural reading of the phrase “final court determination” as used in § 207.6 (c) is that the stay of arbitral proceedings should extend throughout the final determination of the last court to consider the challenge to arbitrability. That would, of course, include appellate review, if an appeal is taken.

This more natural reading better serves the policy of the Rule, as well as allowing a party challenging arbitrability to preserve the status quo while it seeks a final, authoritative ruling of the proper scope of the claims to be resolved through arbitration. That policy is not served by limiting the stay and ordering the parties to proceed to arbitration while the scope of the claims to be heard at arbitration is still under review by a higher court.

Finally, our conclusion that the Rule means for a stay of arbitration to be available until the end of whatever judicial process is pursued, including appellate review, is strengthened by the same tenets of statutory construction involved in our recent decision in *City of Ithaca*:

[S]tatutes should be construed to avoid results which are absurd, unreasonable or mischievous or produce

²² See Statutes, § 94; *Panattieri v City of New York*, 53 Misc3d 865 (Sup Ct NY Co 2016); see generally *People v Aragon*, 28 NY3d 125, 128 (2016).

²³ See, e.g., *Troy, SS v Judy UU*, 69 AD3d 1128, 1135 (3d Dept 2010).

consequences that work a hardship or an injustice. In particular, an interpretation of an act should be avoided which would injuriously affect the rights of others, and that sense should be attached to its provisions which will harmonize its objects with the preservation and enjoyment of all existing right. In sum, a statute should only be construed to require the forfeiture of one statutory right as the price of exercising another when such a reading is compelled by the statutory text or other evidence that so harsh a result was intended.²⁴

Here, although no precisely apposite case has been drawn to our attention, the City's concern that the practice of the Office of Conciliation of disallowing a stay of arbitration processing during appeal might force a forfeiture of rights is a reasonable one. As the facts of this case make clear, failure to timely participate in selection of the arbitrator waives that right. Conversely, judicial decisions involving public sector grievance arbitration have stated that participation in arbitration, including selection of an arbitrator, waives the right to challenge arbitrability by means of a judicial proceeding.²⁵ We need not and do not opine that such would invariably be the case, nor that participation in arbitration selection alone, absent any other act, would suffice to waive the right to challenge arbitrability by means of a judicial proceeding. Rather, confronted with two possible readings of our Rule's language, we construe the Rule in the manner most likely to effectuate the policies of the Act, and to minimize any potential for forfeiture of a legal right to the parties. That such a reading best comports

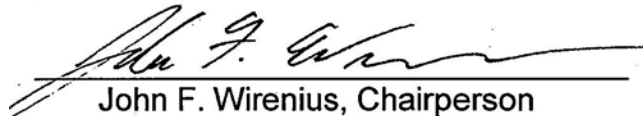
²⁴ 49 PERB ¶ 3030 (2016) (internal quotation marks, footnotes and citations omitted) (citing *People v Dozier*, 78 NY2d 242, 249 (1991)); McKinney's Cons. Laws of NY, Book 1, Statutes §§ 141, 143, 145, 146, 148; Statutes § 146, Comment at 299; *ATM One, LLC v Landaverde*, 2 NY3d 472, 477 (2004); *County of Albany v Hudson River-Black River Regulating Dist*, 97 AD3d 61, 73 (3d Dept 2012).

²⁵ See, e.g., *Rochester City School Dist v Rochester Teachers Assn*, 41 NY2d 578, 582-583 (1977); *In re Jandrew (County of Cortland)*, 84 AD3d 1616, 1617-1618 (3d Dept 2011); *Board of Ed of City School Dist of City of New York (UFT)*, 51 Misc3d 1224 (A), 2016 NY Slip Op. 50806(U) (Sup Ct NY Co May 24, 2016) at * 7.

with the natural meaning of the Rule's language and the overarching policy of the Rule further corroborates our view that this interpretation of § 207.6(c) is the appropriate one. In reaching this conclusion, we are mindful of the delay in the processing of a grievance that is occasioned by the application of the Rule as we have interpreted it today; however, given the current state of the law in this state,²⁶ we are reluctant to place a party in the position of potentially having to choose between which statutory right it will waive.

Accordingly, we vacate the Director's order, and stay all processing of the arbitration pending the conclusion of the appellate process, whether by final disposition by the highest court to which the matter is submitted or by discontinuance, failure to perfect or withdrawal of any pending appeal.

DATED: April 10, 2017
Albany, New York


John F. Wirenius, Chairperson
Allen C. DeMarco, Member
Robert S. Hite, Member

²⁶ CPLR § 7503(b) empowers the Courts to determine, upon application and in the first instance, whether the parties have agreed to arbitrate a particular matter. *See, also, In re City of Johnstown (Johnstown Police Benevolent Assoc)*, 99 NY2d 273 (2002).

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

CATHARINE E. DAVIS,

Charging Party,

CASE NO. U-35261

- and -

UNITED FEDERATION OF TEACHERS,

Respondent,

- and -

**BOARD OF EDUCATION OF THE CITY SCHOOL
DISTRICT OF THE CITY OF NEW YORK,**

Employer.

CATHARINE E. DAVIS, *pro se*

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by charging party *pro se*, Catharine E. Davis, to a decision of the Director of Employment Practices and Representation (Director) dismissing as untimely her claim that the United Federation of Teachers (UFT) violated § 209-a.2 of the Public Employees Fair Employment Act (Act).¹ Davis claimed that the UFT breached its duty of fair representation by refusing to file a grievance on her behalf after her employer improperly reduced the amount of a contractually mandated bonus award she received in November 2009. The Director

¹ 49 PERB ¶ 4588 (2016).

found that the charge, filed on August 17, 2016, was untimely, having been filed more than four months subsequent to the UFT's refusal to represent her in November 2009 and then again in August 2010, and dismissed the charge.

EXCEPTIONS

Davis excepts to the Director's dismissal of the charge on the ground that the UFT, "by denying its contractual role to resolve this matter, created a course of action effective to incur issues of timeliness for its own review and, subsequently, any review by" PERB.² Davis further asserts that the UFT misled her into pursuing other avenues of redress by denying the bonuses were contractually mandated, and thus that the time she spent litigating the matter in federal court should be excluded from the timeliness computation.

The UFT did not file a response to the exceptions.

For the following reasons, we affirm the Director's decision.

DISCUSSION

For the purposes of this decision, we treat as true all allegations in the charge.³

Section 204.1 (a) of the Rules provides that an improper practice charge must be filed within four months of when the charging party had actual or constructive knowledge of the conduct that forms the basis for the alleged improper practice.⁴ Here, Davis was informed that the UFT would not represent her in November 2009, and she had knowledge of the alleged misleading conduct that forms the other basis for the

² Amended Charge, at 2.

³ See *State of New York (SUNY Buffalo)*, 50 PERB ¶ 3001, 3002 (2017).

⁴ *Civil Service Employees Assn, Inc., Local 1000, AFSCME, AFL-CIO*, 28 PERB ¶ 3072, 3168, n. 4 (1995). See also *New York State Thruway Auth*, 40 PERB ¶ 4533, 4595 (2007).

charge by, at the latest, August 2010. Despite this, Davis did not file her charge until approximately six years later, on August 16, 2016. By any definition, Davis's claims concern conduct that occurred well beyond the filing period set by our Rules.

We "strictly apply the timeliness requirement, and it is not tolled by the pendency of a grievance or other related matters."⁵ Similarly, the Board has long held that the "limitation period for filing improper practice charges is not tolled on the basis of a party's belief that a remedy might be obtained in another proceeding or forum," a rule which applies "even when those proceedings have the potential to effectively moot the improper practice alleged."⁶ Therefore, Davis's action in federal court does not toll the four-month period for the filing of an improper practice charge under the Act.⁷

Although the Board has found a respondent to be equitably estopped from asserting a timeliness defense where the respondent has, through its conduct, induced the charging party to delay filing a charge until the filing period has passed, that limited

⁵ *UFT (Cruz)*, 48 PERB ¶ 3004 (2015) citing *Local 456, IBT (Rojas)*, 45 PERB ¶ 3031, 3072 (2012); *State of New York (Insurance Department Liquidation Bureau) (Smulyan)*, 45 PERB ¶ 3008 (2012); *TWU (Edwards)*, 45 PERB ¶ 3014 (2012); see also *State of New York (SUNY Stony Brook)*; 44 PERB ¶ 3021, at 3074, *confirmed sub nom. Cooper v State of New York State University of NY at Stony Brook*, 45 PERB ¶ 7002 (Sup Ct Albany County 2011).

⁶ *Transport Workers Union, Local 100 (Hokai)*, 32 PERB ¶ 3019, 3036 (1999) (previous filing in federal district court did not toll time in which to file charge); citing *NYCTA*, 10 PERB ¶ 3077 (1977); *County of Suffolk*, 19 PERB ¶ 3003, 3006 (1986); see also *Rome Teachers Assn, Inc.*, 41 PERB ¶ 3032, 3139 (2008).

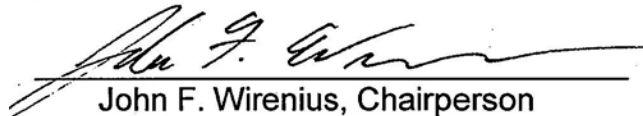
⁷ Here, the claim giving rise to the improper practice was asserted before the United States Equal Employment Opportunity Commission and subsequently with the federal district court, which exercised jurisdiction over the claim from December 2010 (Amended Charge at 2) until it dismissed her action on August 11, 2016. Thus, the Charging Party chose her forum, and cannot simply change her mind. As the Board wrote in a different but analogous procedural context, "[w]e believe this best effectuates the policies of the Act and is in the interest of administrative economy by limiting the parties to the forum of their choosing, but only one forum, for the resolution of their dispute." *County of Sullivan*, 41 PERB ¶ 3006, 3036 (2008).

exception does not apply here, where there is no evidence that Davis was detrimentally induced to delay filing a charge until the appropriate filing period had passed. Similarly, assuming without deciding that that Davis's allegation that the UFT misled her into believing that she had no contractual claim sufficed to state a claim of estoppel, the charge remains time-barred. Davis expressly alleges that she became aware of the misrepresentation by August 2010. Thus, her charge was filed well over five years after the latest possible date of accrual or of estoppel.⁸

Based upon the foregoing, we deny Davis's exceptions and affirm the decision of the Director.

IT IS, THEREFORE, ORDERED that the charge must be, and hereby is, dismissed in its entirety.

DATED: April 10, 2017
Albany, New York


John F. Wirenius, Chairperson
Allen C. DeMarco, Member
Robert S. Hite, Member

⁸ Davis does not raise any claim that that the Board must apply Article 205 of the New York Civil Practice Law and Rules (CPLR), and thereby has waived any such claim. See *NYCTA (Burke)*, 49 PERB ¶ 3021 (2016). However, as we have noted in *District Council 37 (Bacchus)*, decided this day, an improper practice charge before PERB is not a judicial proceeding, and the CPLR does not apply. *Id* (citing cases).

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

MERLENE BACCHUS,

Charging Party,

CASE NO. U-35235

- and -

**DISTRICT COUNCIL 37, AFSCME, AFL-CIO,
LOCAL 372**

Respondent,

- and -

**BOARD OF EDUCATION OF THE CITY SCHOOL
DISTRICT OF THE CITY OF NEW YORK,**

Employer.

**LAW OFFICE OF VINCENT I. EKE-NWEKE, P.C. (VINCENT I. EKE-NWEKE
of counsel), for Charging Party**

BOARD DECISION AND ORDER

This case comes to the Board on exceptions filed by Merlene Bacchus to a decision of the Director of Public Employment Practices and Representation (Director) dismissing her charge alleging that District Council 37, AFSCME, AFL-CIO, Local 372 (Union) violated § 209-a.2 (c) of the Public Employees' Fair Employment Act (Act).¹

Bacchus's charge, filed on August 21, 2016, alleges that she was not properly represented by the Union from the time her employment was terminated on March 11, 2011, until the Union decided not to submit her grievance to arbitration on November 10, 2011. The charge alleges that Bacchus did not receive notification of this decision

¹ 49 PERB ¶ 4570 (2016).

until March 2012. In the cover letter accompanying the charge, Bacchus' attorney states, *inter alia*, that:

...the Charging Party and named Employee Organizations litigated the subject violation in the United States District Court, Eastern District of New York but voluntarily dismissed said action in order to file the Charge with PERB.

Mindful of the fact that the Charge would not be filed with PERB within four months of the alleged improper practice and with full knowledge of the provisions of Section 204.1(a)(1) of PERB's Rules of Procedure which require that improper practice charges be filed within four months of the alleged improper practice, the Employee Organizations agreed to submit to PERB's jurisdiction and as set forth in the attached Stipulation, have waived any and all defenses based on jurisdiction, time bar, laches, or statute of limitations.

Consequently, we respectfully request PERB not to dismiss the Charge on grounds of untimeliness but to adjudicate the Charge fully on the merits.

Bacchus was advised that her charge was deficient because it was untimely. In response, Bacchus's attorney advised that the charging party "wishes to preserve an opportunity to file exceptions to the determination that her improper practice charge is deficient." The Director thereafter dismissed the charge as untimely.

EXCEPTIONS

In her exceptions, Bacchus asserts that the Director erred in dismissing her charge. Bacchus argues that her timely filing of an action in Federal Court tolled the four-month limitation period set forth in the Rules and that, in any event, the charging party and the Union agreed to waive the filing limitations set forth in the Rules. Finally, Bacchus argues that the Federal Court determined that Bacchus had a potentially meritorious claim against the Union for breach of the Union's duty of fair representation

and that, in the interest of justice, the Board should reinstate the charge so that the matter may be determined on its substantive merits.

DISCUSSION

Section 204.1 (a) of the Rules requires an improper practice charge to be filed within four months of when the charging party had actual or constructive knowledge of the conduct that forms the basis for the alleged improper practice.² Here, Bacchus had knowledge of the conduct that forms the basis for the alleged improper practice, at the latest, in March 2012, and yet Bacchus did not file an improper practice charge until nearly four years later on August 21, 2016. Thus, her claims concern conduct that occurred well beyond the filing period set by our Rules.

We “strictly apply the timeliness requirement, and it is not tolled by the pendency of a grievance or other related matters.”³ Similarly, the Board has long held that the “limitation period for filing improper practice charges is not tolled on the basis of a party’s belief that a remedy might be obtained in another proceeding or forum,” a rule which applies “even when those proceedings have the potential to effectively moot the improper practice alleged.”⁴ Therefore, Bacchus’s action in Federal Court does not toll

² *Civil Service Employees Assn, Inc., Local 1000, AFSCME, AFL-CIO*, 28 PERB ¶ 3072, 3168, n. 4 (1995). See also *New York State Thruway Auth*, 40 PERB ¶ 4533, 4595 (2007).

³ *UFT (Cruz)*, 48 PERB ¶ 3004 (2015), citing *Local 456, IBT (Rojas)*, 45 PERB ¶ 3031, 3072 (2012); *State of New York (Insurance Department Liquidation Bureau) (Smulyan)*, 45 PERB ¶ 3008 (2012); *TWU (Edwards)*, 45 PERB ¶ 3014 (2012); see also *State of New York (SUNY Stony Brook)*, 44 PERB ¶ 3021, 3074 (2011), *confirmed sub nom. Cooper v State of New York State University of NY at Stony Brook*, 45 PERB ¶ 7002 (Sup Ct Albany Co 2011).

⁴ *Transport Workers Union, Local 100 (Hokai)*, 32 PERB ¶ 3019, 3036 (1999) (previous filing in Federal District Court did not toll time in which to file charge), citing *NYCTA*, 10 PERB ¶ 3077 (1977); *County of Suffolk*, 19 PERB ¶ 3003, 3006 (1986); see also *Rome Teachers Assn, Inc.*, 41 PERB ¶ 3032, 3139 (2008).

the four-month period for the filing of an improper practice charge under the Act.⁵

Additionally, the parties cannot agree to waive the filing period set forth in the Rules.⁶ Although the Board has found a respondent to be equitably estopped from asserting a timeliness defense where the respondent has, through its conduct, induced the charging party to delay filing a charge until the filing period has passed, that limited exception does not apply here, where there is no evidence that Bacchus was detrimentally induced to delay filing a charge until the appropriate filing period had passed.⁷

Finally, we reject Bacchus's suggestion that the Board must apply Article 205 of the New York Civil Practice Law and Rules (CPLR). The CPLR applies to civil judicial proceedings. An improper practice charge before PERB is not a judicial proceeding,

⁵ Here, the improper practice was itself timely asserted before the Federal District Court, which exercised jurisdiction over the claim over a four-year period. Thus, the Charging Party chose her forum, and cannot simply change her mind. As the Board wrote in a different but analogous procedural context, "[w]e believe this best effectuates the policies of the Act and is in the interest of administrative economy by limiting the parties to the forum of their choosing, but only one forum, for the resolution of their dispute." *County of Sullivan*, 41 PERB ¶ 3006, 3036 (2008).

⁶ *New York State Thruway Authority*, 40 PERB ¶ 3014, 3054 (2007) ("[n]either the Act nor the rules grants parties the right to modify the filing period"). See also *City of Elmira*, 41 PERB ¶ 3018, 3085 (2008).

⁷ See, e.g., *County of Onondaga*, 12 PERB ¶ 3035, 3065 (1979), *confirmed sub nom. County of Onondaga v New York State Pub Empl Relations Bd*, 77 AD2d 783, 13 PERB ¶ 7011 (4th Dept 1980) (finding charge filed 14 months after announcement of change to be timely where employer detrimentally induced employee organization to delay filing a challenge to change pending employer's actions aimed at such revocation); *Great Neck Water Pollution Control District*, 27 PERB ¶ 3057, 3134 (1994) (finding charge filed more than four months after announced change timely where employer led employee organization to believe that that change had been rescinded). Cf. *City of Elmira*, 41 PERB ¶ 3018, at 3086 (finding charging party failed to meet burden of demonstrating that respondent was equitably estopped from asserting timeliness defense).

and the CPLR does not apply.⁸

Based upon the foregoing, we deny Bacchus's exceptions and affirm the Decision of the Director.

IT IS, THEREFORE, ORDERED that the charge must be, and hereby is, dismissed in its entirety.

DATED: April 10, 2017
Albany, New York


John F. Wirenius, Chairperson


Allen C. DeMarco, Member


Robert S. Hite, Member

⁸ See *Matter of Fiedelman v New York State Dept. of Health*, 58 NY2d 80, 82 (1983); *City of Syracuse v New York State Pub Empl Relations Bd*, 279 AD2d 98, 33 PERB ¶ 7022, (4th Dept 2000), *affg* 32 PERB ¶ 3029 (1999), *lv denied* 96 NY2d 717 (2001); 34 PERB ¶ 7025 (2001); *Public Employees Federation*, 31 PERB ¶ 3090, 3203, n. 3 (1998); *Baldwinsville Cent Sch Dist*, 12 PERB ¶ 3040, 3074 (1979).